

No. 15220

**United States
Court of Appeals**
for the Ninth Circuit

GLEN EARL GRIGG,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Northern Division.

FILED

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-30-56

DEC - 3 1956

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Sacramento 14, California;

Attorneys for the Defendant.

In the United States District Court for the Northern
District of California, Northern Division

No. 7317

GLEN EARL GRIGG,

Plaintiff,

vs.

HARVER COON GENDEL, SOUTHERN PA-
CIFIC COMPANY, a Corporation, FIRST
DOE to SIXTH DOE, Inclusive,

Defendants.

Petition of Southern Pacific Company for Removal
of Civil Action From State Court to United
States District Court

To the United States District Court for the North-
ern District of California, Northern Division:

Your petitioner, Southern Pacific Company, a
corporation, petitioning to remove a civil action
brought in the State Court to the United States
District Court for the Northern District of Cali-
fornia, Northern Division, respectfully shows:

I.

On the 27th day of May, 1955, a civil action was
commenced in the Superior Court of the State of
California, in and for the County of Sacramento.
Said action was entitled and numbered on the files
of the Clerk of said Court as appears on the true
and correct copy of the complaint and summons
attached hereto as "Exhibit A." and is incorporated

herein as though fully set forth. The nature of said action appears from the copy of said complaint hereto attached. Said complaint names petitioner, Southern Pacific Company, a corporation, as a defendant. Process in said action was first served on petitioner, Southern Pacific Company, on June 6, 1955. Attached hereto, and marked "Exhibit B," is a true and correct copy of the answer of the petitioner, which constitutes all of the pleadings, motions, order or other papers in addition to the proceeding occurring in open Court, as is hereinafter specifically set forth, from which it was or could be first ascertained that the case is one which has become removable.

II.

Petitioner, Southern Pacific Company, at all times mentioned in said complaint was, and now is, a corporation duly created, organized, and existing under and by virtue of the laws of the State of Delaware, and of no other state, and was at all said times herein mentioned and is still a citizen and a resident of the State of Delaware.

III.

Plaintiff was at the time of commencement of said action, and ever since has been and now is, a citizen of the State of California, and a resident of the Northern District of said State, and non-resident of the State of Delaware.

IV.

Defendant Harver Coon Gendel is named in said complaint as a co-defendant with petitioner, South-

ern Pacific Company, a corporation, but has not been served with summons and complaint in said action and has not appeared voluntarily or at all therein. Defendants First Doe to Sixth Doe, inclusive, are also joined in said action, and Paragraph II of the complaint therein alleges as follows:

“Plaintiff does not know the true names of the defendants designated herein by the fictitious names of First Doe to Sixth Doe, inclusive, and plaintiff prays leave to substitute their true names when the same become known to him and to substitute appropriate charging allegations concerning said fictitiously designated persons.”

No persons have been served with summons and complaint in said action as any of the said fictitiously named defendants, and no person has appeared voluntarily or otherwise in said action sued by name of said fictitious names, nor has any defendant whatsoever appeared in said action at all excepting your petitioner, the defendant, Southern Pacific Company, a corporation.

V.

The above-entitled action is of a civil nature at law, over which the District Courts of the United States are given jurisdiction, brought for the recovery of Twenty-five Thousand Dollars (\$25,000.00) general damages for personal injuries, Fifteen Hundred Dollars (\$15,000.00) damages for injury to an

automobile, and an unstated amount of additional special damages in the nature of medical expenses, automobile towing service and lost use of the automobile, all claimed to have been caused when certain mules or horses, alleged to have been under the care and custody of petitioner, Southern Pacific Company, in the County of Yolo, State of California, strayed upon U. S. Highway 40 and into the path of plaintiff's car.

Petitioner wholly contests and denies the claim in the complaint. The amount in controversy in said action exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00), being of the sum of Twenty-five Thousand Dollars (\$25,000.00) general damages for personal injuries, Fifteen Hundred Dollars (\$1,500.00) damages for injury to an automobile, and an unstated amount of additional special damages in the nature of medical expenses, automobile towing service and lost use of the automobile.

VI.

On the 15th day of November, 1955, the said action came on for trial before the said Superior Court of the State of California, in and for the County of Sacramento, sitting without a jury, upon the plaintiff's complaint and the Answer of defendant, Southern Pacific Company, a corporation, and on said date the plaintiff, by counsel, voluntarily dismissed said action as to all defendants therein, except as to the defendant Southern Pacific Company, a Delaware corporation, petitioner herein.

From the time of and after the dismissal of said action as against all defendants therein except defendant Southern Pacific Company, petitioner herein, said action involved, and it ever since has involved and it still involves, a controversy wholly between citizens of different states which can be fully determined as between them, that is to say, between said plaintiff, a citizen and resident of the State of California, and a non-resident of the State of Delaware, and Southern Pacific Company, a corporation, defendant and petitioner herein, a citizen and resident of the State of Delaware and a non-resident of the State of California.

Upon the dismissal of said action as against all defendants except Southern Pacific Company, said action, which, prior and up to the time of said dismissal, had not been removable to a United States District Court, thereupon and for the first time and forthwith from the time of said dismissal became removable to the proper United States District Court upon the ground of the diverse citizenship of the plaintiff and of the defendant Southern Pacific Company, your petitioner. Thereupon, and promptly after said dismissal and before any other steps have, or any step has, been taken by your petitioner in said action, or in the defense thereof, your petitioner files this, its petition, for the removal of the cause to the proper Federal Court, viz: the United States District Court, in and for the Northern District of California, Northern Division.

VII.

Your petitioner files and offers herewith its bond with good and sufficient surety conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

VIII.

That said suit is now one of which the United States District Courts have original jurisdiction.

Wherefore, petitioner prays that this action be removed from said State Court into the United States District Court for the Northern District of California, Northern Division, and that no other or further proceeding be had in this action in said State Court, and for such other, further and different relief as to the Court may seem proper.

/s/ HORACE B. WULFF,

DEVLIN, DIEPENBROCK
& WULFF,

Attorneys for Defendant
Southern Pacific Company.

Duly verified.

EXHIBIT A

In the Superior Court of the State of California,
in and for the County of Sacramento

No. 100994

GLEN EARL GRIGG,

Plaintiff,

vs.

HARVER COON GENDEL, SOUTHERN PA-
CIFIC COMPANY, a Corporation, FIRST
DOE to SIXTH DOE, Inclusive,

Defendants.

COMPLAINT FOR DAMAGES
(Property Damage & Personal Injury)

The plaintiff complains of defendants, and for
causes of action alleges:

I.

That at all times mentioned herein the defendant,
Southern Pacific Company, was and now is a cor-
poration organized and existing under and by virtue
of the laws of the State of Delaware, and doing busi-
ness in the State of California, and other states, and
at all times herein mentioned, and now is, engaged in
the business of a common carrier by railroad in
interstate commerce in the State of California and
other states. That the defendant, Harver Coon Gen-
del, is a resident and domiciled in the State of Cali-
fornia.

II.

Plaintiff does not know the true names of the

defendants designated herein by the fictitious names of First Doe to Sixth Doe, inclusive, and plaintiff prays leave to substitute their true names when the same become known to him and to substitute appropriate charging allegations concerning said fictitiously designated persons.

III.

That at all times mentioned herein, the said defendant, Southern Pacific Company, owned, operated and maintained railroad lines in and about the City of Sacramento and warehouses, corrals and appurtenant properties and facilities, used in the operation in said railroad by said defendant. That at all times mentioned herein Park Overpass was and is a part of U. S. Highway 40, running in a generally easterly and westerly direction and is located approximately one mile west of Sacramento, California.

IV.

That on or about Friday, December 17, 1954, at or about the hour of 6:15 o'clock p.m. of said day, the plaintiff, Glen Earl Grigg, was operating a 1955 Cadillac automobile sedan, license No. California 2X10758, which automobile was owned by said plaintiff, in a generally easterly direction on the said Park Overpass, U. S. Highway 40, about one mile west of Sacramento, California, and that said plaintiff was proceeding on said highway east towards Sacramento, California.

V.

That on or about the said 17th day of December,

1954, at about the hour of 6:15 o'clock p.m., the said defendants, and each of them, owned, possessed and controlled, and has in their sole care and custody certain mules or horses in the immediate vicinity of said Park Overpass, U. S. Highway 40, approximately one mile west of Sacramento, California, and were so negligent, careless and reckless in their said care, custody and control, ownership and maintenance of said horses and mules as to allow said animals to stray or come upon the said Park Overpass on U. S. Highway 40 and into and upon the main traveled portion of said highway, and into the path of the plaintiff's oncoming car, and that at said time and place, the car of plaintiff was caused to be struck by one or more of said horses or mules with great force and violence, severely damaging the automobile of plaintiff and causing plaintiff to sustain the personal injuries hereinafter set forth.

VI.

That by reason of said wrongful, careless and negligent acts, omissions and conduct of the defendants, and each of them, and their agents, servants and employees, and as a direct and proximate result thereof, plaintiff sustained the following injuries, to wit:

Severe lacerations of his right index and middle fingers and a contusion to the right occipital region of plaintiff's scalp and contusions and abrasions to the left scalp of plaintiff's thorax anteriolaterally; contusions and abrasions to the right hand with fracture of a bony deformity in the right hand; and

contusion to the pelvis and injury to the left hip joint located generally in the femoral triangle region continuing back to the buttock, and severe mental shock, pain and suffering, together with multiple contusions, lacerations and abrasions in and about and upon the body of said plaintiff, all of which rendered the plaintiff sick, sore, lame and disabled, and that he will suffer permanent injuries and disfigurement as a result thereof, and that by reason thereof, plaintiff has been damaged in the sum of Twenty-Five Thousand Dollars (\$25,000.00).

VII.

That as a direct and proximate result of the said negligence and carelessness of the defendants as above alleged, and the injuries suffered therefrom, it was necessary that the plaintiff be hospitalized and plaintiff is required to, and did obtain the services of physicians and surgeons, nurses, hospital and medical care and will be required to expend further sums for the same in the future; that the amount thereof is not now known to plaintiff, and plaintiff prays leave to amend this complaint when the sums so expended are ascertained.

VIII.

That further, as a direct and proximate result of the said negligence and carelessness of the defendants, as above alleged, and the damages sustained to plaintiff's 1955 Cadillac sedan automobile, plaintiff has been caused to expend sums of money to repair

said automobile, and by virtue of said damage to said automobile, the same has depreciated in value and plaintiff has therefore been damaged in the sum of Fifteen Hundred Dollars (\$1500.00) by virtue of the costs of said repairs and the depreciation in value of said automobile as aforesaid.

IX.

That further, as a direct and proximate result of said negligence and carelessness of defendants as above alleged, plaintiff was caused to become obligated to pay the expenses of towing his automobile so as to remove same from the place of accident to the repair shop and for the loss of use of said automobile, causing him to disburse sums of money to secure the use of another car while his automobile was being repaired, the exact of which expenses are presently unknown to the plaintiff who prays leave of this Court to insert the said sum at this place when the same becomes known to plaintiff.

Wherefore, plaintiff prays judgment against defendants, and each of them, for the sum of Twenty-Five Thousand Dollars (\$25,000.00) General Damages, for the sum of Fifteen Hundred Dollars (\$1500.00) Special Damages represented by the damage done to plaintiff's automobile, and for such other special damages and sums of money plaintiff shall expend for medical care, including doctors, nurses, hospital, ambulance, X-rays, and for his cost of tow service and loss of use of automobile during the period it was being repaired, and for such other and

further and different relief as to the Court may seem just and equitable in the premises.

BARNETT & ROBERTSON,
/s/ RODNEY H. ROBERTSON,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed May 27, 1955.

EXHIBIT B

In the Superior Court of the State of California,
In and for the County of Sacramento

No. 100994

GLEN EARL GRIGG,

Plaintiff,

vs.

HARVER COON GENDEL, SOUTHERN PACIFIC COMPANY, a Corporation, FIRST DOE to SIXTH DOE, Inclusive,

Defendants.

ANSWER

Comes now defendant Southern Pacific Company, a corporation, and answering the complaint of plaintiff, admits, denies and alleges as follows:

I.

Answering Paragraphs V, VI, VII, VIII and IX, defendant denies each and every, all and singu-

lar, the allegations thereof and specifically denies that by reason of the alleged or any carelessness or negligence of this defendant, plaintiff has been damaged in the amount alleged or any amount whatsoever or at all.

As and for a Second, Further and Separate Defense to the Complaint of Plaintiff on File Herein, and Without Prejudice to the Defense Hereinabove Set Forth, this Defendant Avers:

That at the time and place mentioned in said complaint, plaintiff so negligently and carelessly drove the said 1955 Cadillac automobile in a general easterly direction along the alleged Park Overpass, U. S. Highway No. 40 and into one or more mules or horses on said Overpass without exercising any care, caution or prudence in the premises, and that if said plaintiff had exercised any care, caution or prudence, he would have seen said mules or horses and would have avoided the alleged collision and any damages or injuries suffered by him, and that his damages and/or injuries, if any, were proximately caused and contributed to by said negligence and carelessness of plaintiff.

Dated: June 28, 1955.

DEVLIN, DIEPENBROCK &
WULFF,

Attorneys for Defendant Southern Pacific Company,
a Corporation.

Duly verified.

[Endorsed]: Filed November 15, 1955.

[Title of District Court and Cause.]

MOTION TO REMAND CIVIL ACTION

The plaintiff, Glen Earl Grigg, moves the Court to Remand the above-entitled cause to the Superior Court of the State of California, In and For the County of Sacramento, on the following grounds:

I.

That the United States District Court has no jurisdiction to hear and determine the above-entitled cause.

II.

That the defendant, Southern Pacific Company, submitted itself to the jurisdiction of the Superior Court of the State of California, In and For the County of Sacramento, and has thereby irrevocably elected to proceed to trial in the aforesaid court and has waived its right to trial in the United States District Court.

III.

That if defendant, Southern Pacific Company, has not waived its right to Petition for Removal, its petition was premature in that plaintiff had not made his final election to proceed in the State Court since no dismissal had been entered against the defendants, First Doe to Sixth Doe, inclusive, and the trial of the cause in the State Court had not yet commenced.

Wherefore, plaintiff, Glen Earl Grigg, moves the above-entitled Court for its order remanding the

above-entitled cause to the Superior Court of the State of California, In and For the County of Sacramento, together with its order for his costs incurred thereby.

Dated: November 28th, 1955.

BARNETT & ROBERTSON,
CHARLES J. MILLER,

Attorneys for Plaintiff;

/s/ RODNEY H. ROBERTSON.

Affidavit of service by mail attached.

[Endorsed]: Filed November 29, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION TO
REMAND CAUSE

To the defendant, Southern Pacific Company, and
to Devlin, Diepenbrock & Wulff, its attorneys:

You, and Each of You, Will Please Take Notice and you are hereby notified that on the 5th day of December, 1955, at the hour of 10:00 o'clock a.m., in the above-entitled Court, before the Honorable Sher-rill Halbert, Judge thereof, at the Courtroom of said Court located at Federal Post Office, Sacramento, California, the plaintiff, Glen Earl Grigg, will move the above-entitled Court for its order remanding said action to the Superior Court of the State of California, In and For the County of Sacramento,

and for his costs incurred thereby, upon the grounds that the above-entitled Court is without jurisdiction to hear and determine said action and upon the further grounds that the defendant, Southern Pacific Company failed to Petition to Remove said cause within the time required by law, has submitted itself to the jurisdiction of the Superior Court of the State of California, In and For the County of Sacramento and has waived its right to trial in the United States District Court thereby.

This Motion will be based upon the grounds above specified and upon the Answer to Petition for Removal filed herein, and upon the affidavits of counsel for plaintiff filed herewith, and upon the transcript of proceedings annexed as Exhibit "A" to plaintiff's Answer, filed herein, and upon the Points and Authorities filed herewith, and upon all the records, files, pleadings and documents on file in this action.

Dated: November 28th, 1955.

BARNETT & ROBERTSON,
CHARLES J. MILLER;

/s/ RODNEY H. ROBERTSON,
Attorneys for Plaintiff.

MEMORANDUM OF POINTS AND AUTHORITIES

Memorandum of Points and Authorities will be filed on December 1, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF COUNSEL IN SUPPORT
OF MOTION TO REMAND

State of California,
County of Sacramento—ss.

Charles J. Miller, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above-entitled matter, and makes this affidavit as such; that since July of 1955, he has carried on numerous conversations with Mr. John Diepenbrock, one of the attorneys for Southern Pacific Company, with regard to the above matter; that your affiant has also entered into numerous stipulations with Mr. Diepenbrock concerning the above matter, as follows:

July 13, 1955: Oral stipulation that August 5, 1955, be a satisfactory date for taking depositions of Mr. Perine and Mr. Fisher, employees of defendant Southern Pacific Company;

July 20, 1955: Oral stipulation that depositions of Perine and Fisher be postponed to August 23, 1955, in order to avoid any interference with Mr. Fisher's vacation;

September 15, 1955: Oral stipulation that defendant Southern Pacific Company take deposition of the plaintiff on September 27, 1955, and oral stipulation that plaintiff be subjected to physical examination by defendant on the same date;

November 3, 1955: Written stipulation that deposition of Dr. Henning be taken in San Francisco, on November 11, 1955;

November 11, 1955: At the taking of the aforesaid deposition, Mr. Diepenbrock stipulated with Mr. Robertson that the deposition could be read into evidence without being signed by Dr. Henning. At this time Mr. Diepenbrock requested, and was given, X-rays of Mr. Grigg's hip, so that he could show said X-rays to the physician for Southern Pacific Company prior to the trial on November 15, 1955;

November 14, 1955: In the late afternoon of the day before the trial, Mr. Diepenbrock called at the office of your affiant for the purpose of examining certain exhibits plaintiff proposed to offer into evidence. Mr. Diepenbrock was permitted to examine these exhibits for the purpose of agreeing upon a stipulation that the exhibits might be admitted into evidence. After examining the said exhibits, Mr. Diepenbrock entered into an oral stipulation that the said exhibits might be admitted into evidence at the trial the following day;

That upon numerous occasions throughout the above period your affiant informed Mr. Diepenbrock that plaintiff has been unable to serve Harver Coon Gendel with summons and complaint; your affiant asked Mr. Diepenbrock if his office knew the whereabouts of Mr. Gendel and was told that Mr. Diepenbrock had no knowledge of Mr. Gendel's where-

abouts; that more than thirty days prior to the trial of the above matter, your affiant again told Mr. Diepenbrock of plaintiff's inability to locate Mr. Gendel, and told him that plaintiff would dismiss without prejudice as to Mr. Gendel and proceed to trial against Southern Pacific Company alone; that Mr. Diepenbrock, by his actions and conduct led your affiant to believe that defendant Southern Pacific Company was agreeable to a trial in the Superior Court despite the commitment of plaintiff to proceed against Southern Pacific Company alone; that by said tactics Mr. Diepenbrock obtained possession of certain X-rays and was permitted to examine certain other exhibits of plaintiff; that had your affiant known of the concealed intent of Mr. Diepenbrock to petition for removal to Federal Court upon the day of trial, your affiant would not have permitted Mr. Diepenbrock to obtain possession of said X-rays or examine said other exhibits.

That at the time Southern Pacific Company filed its petition for removal the trial of the above-entitled matter and not as yet commenced; that when said petition was filed, your affiant was arguing a motion to amend the plaintiff's complaint, which motion had been noticed for hearing on the trial date;

That subsequent to the filing of the Complaint, your affiant made an investigation for the purpose of learning the whereabouts of Mr. Gendel; that your affiant states, upon information and belief, that Mr. Gendel was not, at the time of the commence-

ment of the action, a citizen of the State of California; that said information was equally available to defendant Southern Pacific Company;

That your affiant has now determined that Anthony Perine and Sigmund A. Fisher are two of the persons named as Doe defendants in the complaint of plaintiff; that both Perine and Fisher are citizens of the State of California;

That plaintiff has incurred the following costs as a result of the filing of the petition for removal to Federal Court:

Travel and meals for Mr. Grigg and Mr.

Robertson (estimated)	\$ 50.00
Hotel accommodations for Mr. Grigg.....	8.14
Hotel accommodations for Mr. Robertson...	9.75
One day's attorney fees—Mr. Miller and Mr. Robertson	\$200.00
Transcript of proceedings before Superior Court on November 15, 1955.....	27.20
Certification of Exhibits to Answer.....	4.05
Estimated charge for lost time—expert wit- ness	40.00
Witness fees paid.....	26.50
Service of subpoenas.....	15.20
Long distance telephone calls to out-of-town witnesses (estimated)	1.32
Total	\$382.16

/s/ CHARLES J. MILLER.

Subscribed and sworn to before me this 29th day of November, 1955.

[Seal] /s/ [Illegible],

Notary Public in and for Said
County and State.

Affidavit of service by mail attached.

[Endorsed]: Filed November 29, 1955.

[Title of District Court and Cause.]

ANSWER TO PETITION OF SOUTHERN PA-
CIFIC COMPANY FOR REMOVAL OF
CAUSE

Comes now the plaintiff, Glen Earl Grigg, and for his Answer to Petition of Southern Pacific Company for Removal of Civil Action from State Court to United States District Court, admits, denies or alleges as follows:

I.

Admits the allegations of Paragraphs I, II, III and IV of defendant's Petition for Removal.

II.

Admits the allegations contained in Paragraph V of said Petition for Removal excepting the allegations commencing with the word "all" at line 21, page 3, and ending with the words "Pacific Company," line 23, page 3. In this regard, plaintiff, Glen Earl Grigg, alleged in his complaint (Exhibit A to the Petition), Paragraph V thereof as follows:

“That on or about the 17th day of December, 1954, at about the hour of 6:15 o'clock p.m., the said defendants, and each of them, owned, possessed and controlled and had in their sole care and custody certain mules and horses * * *”
(Emphasis added.)

III.

Answering Paragraph VI of said Petition for Removal, the plaintiff denies that on November 15, 1955, by his counsel that he dismissed his action “as to all defendants therein, except as to the defendant Southern Pacific Company” and in this regard allege that plaintiff’s counsel dismissed said action without prejudice solely against the defendant, Harver Coon Gendel. There is attached hereto and marked Exhibit “A” a copy of the transcript of proceedings had before the Superior Court in said action on November 15, 1955.

This answering plaintiff denies that the said action had not been removable prior to the dismissal of Harver Coon Gendel but avers that said action was subject to a Petition of Removal from the date of service of process on defendant, Southern Pacific Company, on June 6, 1955, in that there was no allegation of said complaint of plaintiff barring the filing of a Petition for Removal at the aforesaid date.

Plaintiff avers that the Complaint does not plead the citizenship of the parties so as to bar the filing of a Petition for Removal on defendant’s part and that therefore, in failing to Petition for Removal within the statutory period following service of

process, the said Petitioner, Southern Pacific Company, has irrevocably waived such right to file said Petition.

IV.

This answering plaintiff admits the allegations of Paragraph VII of the Petition for Removal.

V.

This answering plaintiff denies the allegations of Paragraph VIII of the Petition for Removal and does hereby incorporate herein by reference the allegations of Paragraph IV of this Answer as though set forth in full herein.

Wherefore, this answering plaintiff prays that the Petition for Removal be denied and that plaintiff's Motion to Remand, filed simultaneously herewith, be granted and that the plaintiff, Glen Earl Grigg, be awarded his costs incurred herein.

BARNETT & ROBERTSON,
CHARLES J. MILLER,
Attorneys for Plaintiff,

/s/ RODNEY H. ROBERTSON.

State of California,
City and County of San Francisco—ss.

Rodney H. Robertson, being first duly sworn, deposes and says:

He is an attorney at law and one of the attorneys for Glen Earl Grigg, the plaintiff in the within en-

titled proceeding; that affiant has charge of the said proceeding on behalf of said plaintiff and that he has read the foregoing Answer to Petition and knows the contents thereof, and that the same is true of his own knowledge except as to such matters that are therein stated upon his information or belief, and as to those matters that he believes it to be true.

That affiant makes this verification on behalf of plaintiff for the reason that said plaintiff is absent from the City and County of San Francisco.

/s/ RODNEY H. ROBERTSON.

Subscribed and sworn to before me this 21st day of November, 1955.

[Seal] /s/ ETTA T. BURNS,
Notary Public in and for the City and County of
San Francisco, State of California.

EXHIBIT A

In the Superior Court of the State of California,
In and for the County of Sacramento
Department Number Four

No. 100994

GLEN EARL GRIGG,

Plaintiff,

vs.

HARVER COON GENDEL, SOUTHERN PA-
CIFIC COMPANY, a Corporation,

Defendants.

Hon. Jay L. Henry, Judge.

Tuesday, November 15, 1955

REPORTER'S TRANSCRIPT OF PROCEED-
INGS HAD AT TRIAL OF ABOVE-ENTI-
TLED ACTION

Appearances:

For the Plaintiff:

CHARLES J. MILLER, ESQ.,
BARNETT & ROBERTSON,
RODNEY H. ROBERTSON, ESQ.

For Defendant Southern Pacific Company:

DEVLIN, DIEPENBROCK & WULFF,
HORACE B. WULFF, ESQ.,
JOHN V. DIEPENBROCK, ESQ.,

The above-entitled cause came on regularly this day before Hon. J. L. Henry, Judge of the Superior Court of the State of California, in and for the County of Sacramento. The plaintiff was represented by Charles J. Miller, Esq., and Rodney H. Roberston, Esq. The defendant, Southern Pacific Company, was represented by Horace B. Wulff, Esq., and John V. Diepenbrock, Esq. The following proceedings were had, to wit:

The Court: Grigg vs. Gendel and Southern Pacific Company.

Mr. Miller: Your Honor, I am one of the attorneys appearing for Mr. Grigg. Mr. Robertson and Mr. Grigg should be here momentarily.

The Court: They are not here yet?

Mr. Miller: They are not here as yet and I would like a slight delay until they arrive.

The Court: Very well.

Mr. Miller: Perhaps we could dispose of a motion that we have to amend our complaint to increase the general damages to \$70,000 from \$25,000 and the motion is noticed for this morning.

The basis of the motion is affidavit of counsel that at the time the original complaint was filed we were not aware of the extent of Mr. Grigg's injuries and the degree to which the injuries would cause permanent disability and as a matter of fact, we only received that report on October 27, 1955, as is shown by the letter of Dr. Henning attached to the affidavit as an exhibit.

The Court: I don't see any of those papers in the file here.

Mr. Miller: They were filed, they must be in Department Two because I did file them.

The Court: Were you served?

Mr. Wulff: We were served, yes, if your Honor please, a notice of proposed amendment and affidavit of counsel.

The Court: When were you served?

Mr. Wulff: I can't answer that.

Mr. Miller: The affidavit of service by mail, I think, will show that; I think it was mailed out last week sometime.

Mr. Wulff: It was mailed in San Francisco.

Mr. Miller: No, in Sacramento.

Mr. Wulff: On the 10th of November.

The Court: Is there any objection to filing this or granting this motion?

Mr. Wulff: We are not going to agree to any amendment to increase the prayer but we have nothing to submit in opposition thereto.

The Court: Why all this delay? Why on the eve of the trial do you make these motions?

Mr. Miller: I believe the evidence will show that there is an X-ray taken the latter part of October.

The Court: Why wasn't it taken sooner?

Mr. Miller: Well, there was an X-ray taken in September that was not satisfactory, the X-ray was taken again in the latter part of October and on the basis of that X-ray we received a new report from the doctor which changed the picture quite a bit and in which the doctor stated that it was his opin-

ion that the injuries would cause severe permanent disability and he saw little hope in surgery correcting the condition and upon that basis we felt that the prayer as originally placed on file was inadequate and for that purpose it was necessary to file the motion to amend the complaint.

I believe that notice of motion must be in Department Two because it was filed there.

The Court: Well, it is not in this file.

You gentlemen are appearing for the defendant, the Southern Pacific Company?

Mr. Wulff: That is right, your Honor.

The Court: Who is representing Mr. Gendel?

Mr. Miller: I am Mr. Miller of Sacramento and this is Mr. Robertson of the firm of Barnett & Robertson of San Francisco, sitting on my left.

The Court: I mean the defendant Harver Coon Gendel.

Mr. Miller: He was not served, your Honor.

The Court: Was he served with a notice of your motion?

Mr. Miller: He was not served at all, your Honor; we have been unable to locate him. We have made numerous efforts to serve him with process but they have been to no avail.

The Court: What are you doing with respect to him?

Mr. Miller: With respect to him, we would at this time ask to dismiss without prejudice.

The Court: Well, very well. You make that motion, do you?

Mr. Miller: Yes, your Honor.

The Court: That will be granted.

Mr. Wulff: Under those circumstances the case now becomes removable to the Federal Court and we are now in the process of taking steps to remove it to the Federal Court on the ground there is a diversified citizenship now between plaintiff and the defendant, remaining defendant, Southern Pacific Company, and consequently it becomes removable under the Federal law now on the filing of our petition in the Federal Court and serving a notice thereof upon both the plaintiff and the Clerk of this Court.

Now, that is in process of being done and when that service is had this Court loses all jurisdiction to proceed.

There is no controversy under the law because this is a dismissal of the action and now the only action left is the action between the plaintiff and the one defendant, Southern Pacific Company, under the purely voluntary dismissal by the plaintiff of the other defendant and the case will be removed and we are making the necessary moves as promptly as possible, as soon as the removability feature appears we take proper steps and there is nothing to do now until the petition is filed and it is being filed now and will be given a number and when it is served on the Clerk and the plaintiff the Court loses all jurisdiction.

The Court: I take it that the case is out of our hands.

Mr. Wulff: That is correct.

Mr. Miller: We will contest the removal to the

Federal Court, your Honor, it places us in rather a difficult position.

Mr. Robertson: If it please the Court, I am Mr. Robertson, one of the attorneys for the plaintiff and I would object to removal on the grounds that there is no jurisdiction to remove this case at this time for the simple reason that the defendant, Southern Pacific Company, has already filed a general appearance in this case and has submitted itself to the jurisdiction of this Court.

In order to remove a case you must petition and remove to the Federal Court prior to appearing. They have submitted to the jurisdiction of this Court and therefore the jurisdiction of this Court attaches to this defendant and they cannot at this late date move to remove the case from the jurisdiction to which they have already submitted.

They are doing business in the State and have submitted to the Court's jurisdiction by entry of answer in this case and have taken depositions under the order of this Court in this case and have therefore submitted themselves to the jurisdiction of this Court and therefore they are not entitled to remove and I respectfully submit to your Honor we should proceed here.

Mr. Wulff: If your Honor please, let the record show we have filed copy of petition and bond together with notice of removal and have served them on counsel for the plaintiff and a copy thereof served or lodged with the Clerk of this Court so therefore under paragraph 1446 of Title 28 U.S.C.A., subdivision E reads promptly after filing of said pe-

tion and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the Clerk of such State Court, which shall effect the removal and the State Court shall proceed no further unless and until the case is remanded.

If there is any defects in jurisdiction, they have to be heard by way of motion to remand in the Federal Court because it is only the Federal Court that can test its own jurisdiction because this Court has lost jurisdiction by the removal proceedings, whether they are rightly or wrongly taken.

The disposes of the argument by counsel because this Court has no jurisdiction to test the jurisdiction of the Federal Court, but, irrespective of that, if the Court is interested, the case of Southern Pacific Company vs. Haight, arising from our own Court, appearing in 126 Federal 2nd, 900, that precise question was before the Court and in that case Haight sued the Southern Pacific Company and a group of crew members involved in a crossing case, but only the Southern Pacific Company was served and the resident or individual defendants were not served and the plaintiff announced in that case her readiness to proceed to trial against the Southern Pacific Company alone and the Court there held that constituted a severance of the cause of action. In this case, a very similar incident happened in that the plaintiff announced their intention to proceed against the non-resident defendant after first dismissing against the other defendant and con-

sequently there is left a case between the plaintiff and the non-resident defendant alone.

In the Haight case they raised the precise point that counsel has raised here and reading now from the decision, the question arises as to whether or not the petition for removal was timely. The petition was filed under the same circumstances as filed here and the plaintiff argued in the District Court, seeking to remand, that the petition, if proper at all, should have been made prior to the defendant's answer to the complaint or at least immediately after service of the memorandum to set the case for trial. In other words, we didn't file prior to the filing of the action or in the twenty day period and the Court there held that however the fact that the plaintiff set the case for trial, the fact that the resident defendant was not served and did not appear at the time set for trial would not of necessity be known to the non-resident defendant and therefore his right to remove could not be denied because he did not move for the severance upon being served with notice of setting the case for trial. However, the fact that plaintiff had the case set for trial, knowing that the resident defendant had not been served, and appeared in Court with such knowledge and announced that she was ready for trial is conclusive evidence that she regarded the action as severed and negatives the idea that she had not definitely determined upon her course and acted upon such determination instead of having inadvertently placed her case in a position subject to removal and therefore subject to withdrawal with the

Court's permission of her petition and consent to proceed.

In that case the Court held that the first time the case became removal the attorneys for the defendant proceeded promptly.

Mr. Miller: With regard to that, I have discussed, and am willing to be sworn and state under oath, that I have discussed the matter with Mr. Jack Diepenbrock for the defendant concerning service of summons and complaint upon Mr. Gendel and I have asked him on numerous occasions if he knew the whereabouts of Mr. Gendel and informed him we have been unable to serve Mr. Gendel and we were making every possible effort to effect service upon him.

Within thirty days prior to this trial date I stated to Mr. Diepenbrock that it would be impossible for us to serve Mr. Gendel, the defendant and stated at that time and that has been within the last thirty days at that time that at the time of the trial we would dismiss without prejudice as to Mr. Gendel.

It became apparent at that time, more than thirty days, almost thirty days ago, that Mr. Gendel would not be a defendant at this trial and I submit that if the motion was to be made it should have been filed and made at that time because they were aware of the fact that Mr. Gendel could not be served, they were informed by my office, by me personally that Mr. Gendel had not been served and we would dismiss without prejudice to him.

I submit that the motion at this time is most untimely and is pursued only for the purpose of delaying this trial.

Mr. Wulff: I think counsel does not understand the removability law and statutes relative thereto. They are rather technical and let me state to counsel that this is his voluntary action of dismissing, in other words, he said he was going to dismiss but until he did there was no controversy existing only between the two parties of diversified citizenship.

Section 1446, subdivision B expressly provides that if the case stated by the initial pleading was not removable, and that is our case here because he had a joint tort alleged, the defendants being a resident and non-resident charged in the pleadings, the case stated by the original pleading is not removable, a petition may be served within twenty days after receipt of copy of amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which has become removable.

By the Court making this order upon their voluntary solicitation of dismissal the case became removable and nothing that happened before, advising us that they might do it is immaterial because for example here is a case in 114 Federal Supplement at page 659 where they advised they were going to go ahead with the trial against the non-resident only and wrote a letter to the defendant's attorney advising them of that and they held that there was no severance because they still had the right to serve the defendant or do anything they wanted.

It is the actual act that makes the cause remov-

able, that gives us the right to remove and the act occurred here within the last ten minutes.

Mr. Miller: May I ask the Court, if there is any other alternative when the defendant Mr. Gendel is not served but for us to dismiss the action against him. I submit and have argued already that this is a motion, a most apparent delaying tactic that the attorneys for the Southern Pacific are pursuing, they have taken deposition, they took a deposition as recently as last Friday, I believe it was, November 11th, took the deposition in San Francisco on that date and they have come right up to the moment of trial and we have all our witnesses subpoenaed, we have made arrangements for doctors to testify and on the morning of the trial for the first time they indicate their desire to transfer the matter to the Federal Court.

The Court: According to the authorities they have cited here, that is the first opportunity they have had to make such a motion.

Mr. Miller: I think they had the opportunity to make the motion when it became apparent that Mr. Gendel could not be in this trial.

The Court: Not according to the cases. I haven't read those cases but if counsel is reading them correctly and I assume he is, the motion will be premature until the action was finally dismissed as to the resident defendant.

Mr. Wulff: That is correct, your Honor, the dismissal created the removability and we acted promptly upon it. We have that right to remove if we elect to exercise it.

The Court: You have filed these papers, have you?

Mr. Wulff: Yes, your Honor.

Mr. Miller: Your Honor, inasmuch as we have not dismissed as to any of the Does, First Doe to the Sixth Doe, we request that the matter be put over for thirty days for the purpose of allowing us to serve summons by substitute process upon parties who are at the present time unknown.

The Court: Apparently I have lost jurisdiction.

Mr. Miller: There is no order here transferring it to the Federal Court.

Mr. Wulff: You don't do it that way.

The Court: Under the new procedure it goes up automatically.

Mr. Wulff: That is right.

The Court: And then you make a motion to **re-mand**.

Mr. Robertson: I understand that procedure, however, I might point out that they have based their entire petition on the ground there is now a diversity, based upon a dismissal of the defendant Gendel, however, there are citizen defendants in the case, First Doe through Sixth Doe and the fact is Mr. Gendel, who has been closely connected with the Southern Pacific Company, has been reported living in Arizona and wilfully avoiding service and it is our contention since there are still Doe defendants in the case against which we have made no motion to dismiss their motion is not proper. If your Honor were to say the mere filing of a petition to remove divests the Court of jurisdiction in every

case, the Court could be divested on that basis the day of trial, however, I think your Honor that the motion must be shown on its face to be a correct motion and here there are still other defendants in the case against whom no motion has been made, therefore we would be entitled, your Honor would still have jurisdiction and we would be entitled to a reasonable period of time in view of this prize condition, to go forward and effect substitute service on this defendant through the processes provided by law.

The Court: You don't allege these John Doe defendants are residents any place, you only allege this defendant Gendel, and these defendants are fictitious defendants and are sued under these fictitious names and there are no charging allegations against the Does.

Mr. Robertson: Under the circumstances, if your Honor feels you have been divested of jurisdiction temporarily by the motion, it would be incumbent upon us, if your Honor feels this petition is valid even though there are defendants in the action, that we go forward to the Federal Court and make the normal petitions and take such steps as we deem advisable.

The Court: I feel under the circumstances I haven't anything else to do.

Mr. Wulff: That is correct.

The Court: But order the case off the calendar and you gentlemen can make your motion to remand.

I think it ought to be understood, I haven't ruled

on this motion to increase the prayer of their complaint——

Mr. Wulff: The Court has lost jurisdiction now.

Mr. Robertson: Well, your Honor, at this time, in order to make a clear record in this case, the plaintiff will request to be relieved of its dismissal of the defendant Harver Coon Gendel, without prejudice, on the grounds of surprise in view of the conduct of the defendant and we will move at this time formally to be relieved of our motion.

Mr. Wulff: The Court can't pass on any motion at all.

Mr. Robertson: I want to make that for the record.

The Court: I would like the record to show that the decision is reserved on the motion to amend the complaint by increasing the prayer. I think they are entitled to have that granted ultimately, either here or in the Federal Court.

Mr. Wulff: The Federal Court has full power to amend pleadings.

The Court: I think the ruling on that should be reserved. I didn't rule one way or the other.

Mr. Robertson: You know eventually your motion is not going to be upheld in the Federal Court; it will be remanded.

Mr. Wulff: If you can do it that is your privilege.

The Court: That is your next step.

Certificate of Court Reporter

State of California,
County of Sacramento—ss.

I hereby certify that the foregoing pages numbered 1 to 16, both inclusive, constitute a full, true and correct transcription of the proceedings had at the trial of the above-entitled matter reported by me on the 15th day of November, 1955.

Dated, Sacramento, California, November 29, 1955.

/s/ J. C. DUNN,
Official Court Reporter.

[Endorsed]: Filed November 29, 1955.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

The motion of the plaintiff to remand the above-entitled action to the Superior Court of the State of California, in and for the County of Sacramento, for trial and further proceedings came on regularly to be heard this 5th day of December, 1955. Both parties appeared by and through their respective counsel. Counsel for both parties argued said motion and the same was submitted to the Court for its decision and determination. The Court having considered said motion and the authorities submitted in connection therewith and being fully advised in the premises, now makes its order as follows:

It Is Hereby Ordered that plaintiff's motion to

remand this action to the Superior Court of the State of California, in and for the County of Sacramento, for further proceedings be, and the same is, hereby denied.

Dated: December 5, 1955.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed December 5, 1955.

[Title of District Court and Cause.]

MINUTE ORDER

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday, the 19th day of December, in the year of our Lord one thousand nine hundred and fifty-five.

Present: The Honorable Sherrill Halbert,
U. S. District Judge.

This case came on regularly this day for Motion to file Amendment to Complaint and Motion to set. Charles J. Miller, Esq., present for the Plaintiff, and John V. Diepenbrock, Esq., present for the Defendant.

After hearing counsel, It Is Ordered that motion to file Amendment to Complaint be and the same is hereby Granted and Motion to set be and the same is hereby continued to January 16, 1956.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

This complaint filed in the above-entitled matter on May 27, 1955, is hereby amended by plaintiff to read as follows:

Page 3, Line 17, to read:

Seventy Thousand Dollars (\$70,000.00).

Page 4, Lines 14-15, to read:

Each of them for the sum of Seventy Thousand Dollars (\$70,000.00) general damages for the sum of Fifteen Hundred (\$1500.00).

Dated December 8, 1955.

BARNETT & ROBERTSON,
CHARLES J. MILLER,

/s/ RODNEY H. ROBERTSON,
Attorneys for Plaintiff.

Lodged December 12, 1955.

[Endorsed]: Filed December 19, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled action having heretofore regularly come on for trial before the above-entitled Court, Honorable Sherrill Halbert, Judge, presiding, a jury having been waived, the plaintiff appear-

mules and the consignee of said shipment, unloaded said horses and mules from said cars into said corral, watered them, fed them and took the exclusive custody and possession thereof; that from and after the arrival of said two (2) cars of horses and mules in West Sacramento, State of California, at or about the hour of 10:30 o'clock a.m. on the 16th day of December, 1954, to and including approximately the hour of 4:30 o'clock p.m. on the 18th day of December, 1954, (at which latter date the said H. L. Coon executed an order of diversion pursuant to which said shipment was reloaded and carried to Santa Rosa, California, the defendant, Southern Pacific Company had no possession and/or control of said horses or mules but, to the contrary, the sole and exclusive care, custody, control, ownership and maintenance of said horses and/or mules was with said consignee and owner, to wit, H. L. Coon.

VII.

That on the 17th day of December, 1954, at or about the hour of 6:15 o'clock p.m. of said day the plaintiff, Glen Earl Grigg, was operating his 1955 Cadillac automobile sedan in a general easterly direction on said Park overpass, U.S. Highway 40, and about one (1) mile west of Sacramento, California, and that while said horses and mules were in the exclusive care, custody, control, ownership and/or maintenance of H. L. Coon the latter, without any participating act or omission by defendant Southern Pacific Company, negligently and carelessly permitted or allowed said horses and mules

to stray or come upon said Park overpass on said U.S. Highway 40 and into the path of plaintiff's oncoming car, and at said time and place the car of plaintiff was caused to be struck by one or more horses or mules, damaging said car of plaintiff and causing plaintiff to sustain certain personal injury of undetermined nature and extent.

VIII.

That at the said time and place when plaintiff's said automobile struck one or more of said horses or mules, the plaintiff, Glen Earl Grigg, was operating his car with reasonable care and was not guilty of contributory negligence in the operation of his said automobile.

Conclusions of Law

As conclusions of law of the above and foregoing facts, the court finds as follows:

That the plaintiff take nothing by his said complaint against the defendant, Southern Pacific Company, a corporation, and that the same be dismissed and that said defendant recover its costs of suit therein incurred.

Let judgment on the merits be entered in accordance herewith.

Dated: March 30, 1956.

/s/ SHERRILL HALBERT,
Judge.

Lodged March 21 1956.

[Endorsed]: Filed March 30, 1956.

In the United States District Court for the Northern District of California, Northern Division

No. 7317

GLEN EARL GRIGG,

Plaintiff,

vs.

HARVER COON GENDEL; SOUTHERN PACIFIC COMPANY, a Corporation; FIRST DOE to SIXTH DOE, Inclusive,

Defendants.

JUDGMENT

The above-entitled action having heretofore regularly come on for trial before the above-entitled court, Honorable Sherrill Halbert, Judge, presiding, a jury having been waived, plaintiff appearing by his counsel, Charles J. Miller, Esq., and Messrs. Barnett & Robertson; and the defendant, Southern Pacific Company, a corporation, appearing by its counsel, Horace B. Wulff, Esq., and Messrs. Devlin, Diepenbrock & Wulff; and evidence both oral and documentary having been adduced, and after the plaintiff had completed the presentation of his evidence and rested his case, the defendant, Southern Pacific Company, reserving its right to offer evidence in the event that its motion be not granted, having moved the above-entitled court for dismissal on the ground that upon the facts and law the plaintiff had shown no right to relief as against the defendant, Southern Pacific Company, a corpora-

tion; and said motion having been duly argued and submitted and the Court as a trier of the facts having been elected to determine them and dispose of the case on its merits, and the Court having heretofore made and caused to be filed herein its written findings of fact and conclusions of law and being duly advised,

Now, Therefore, by reason of the law and the findings of fact and conclusions of law aforesaid, it is hereby ordered, adjudged and decreed that the plaintiff take nothing by this action and the same be and is hereby dismissed and the defendant, Southern Pacific Company, a corporation, do have and recover of and from plaintiff its costs of suit herein incurred in the sum of Dollars (\$.....).

Dated: March 30, 1956.

/s/ SHERRILL HALBERT,
Judge.

Lodged March 21, 1956.

[Endorsed]: Filed March 30, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL AND
FOR AMENDED FINDINGS

To: Southern Pacific Company, Defendant, and
Devlin, Diepenbrock & Wulff, its attorneys:

You Will Please Take Notice that on Monday, the 23rd day of April, 1956, at 9:30 o'clock a.m. of said day, plaintiff will, at the courtroom of the above-entitled court, located at the Federal Building, Sacramento, California, move the court for its order granting a new trial in the above matter and for its order amending the findings of fact in said matter.

Annexed hereto and made a part of this notice are:

- (1) Motion for New Trial and Amended Findings;
- (2) Memorandum of Points and Authorities in Support of Motion for New Trial;
- (3) Proposed Amended Findings of Fact.

Said motions will be based upon this notice, the above-listed documents, the testimony adduced at the trial and the exhibits admitted therein, and upon all the pleadings, papers, records and files in this action.

Dated: April 6, 1956.

BARNETT & ROBERTSON,
CHARLES J. MILLER,

By /s/ CHARLES J. MILLER,
Attorneys for Plaintiff.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND FOR
AMENDED FINDINGS

Pursuant to Rule 59, plaintiff moves the Court for its order setting aside the findings and decision in the above action, and granting a new trial therein on the following grounds materially affecting the substantial rights of said plaintiff, to wit:

1. That the evidence is insufficient to justify the decision;
2. That said decision is against the law;

Plaintiff also moves the honorable court, pursuant to Rule 59, for its order amending its findings of fact in the respects set forth in the Proposed Amended Findings of Fact annexed hereto.

This motion is based upon this document, the testimony adduced at the trial of the matter and exhibits admitted therein, and upon the pleadings, papers, records and files in this action.

Dated: April 4, 1956.

BARNETT & ROBERTSON,
CHARLES J. MILLER,

By /s/ CHARLES J. MILLER,
Attorneys for Plaintiff.

[Endorsed]: Filed April 9, 1956.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

In this case the Court has before it for decision and determination plaintiff's motion for a new trial and for amended findings, and plaintiff's motion to amend complaint to conform to evidence. Each of these motions has been argued by counsel representing each of the parties, and the respective parties have supported their positions by written memoranda. The Court has now reviewed the file in this case, the evidence adduced at the trial, and the law applicable to each of these motions, and good cause appearing therefor:

It Is Hereby Ordered that plaintiff's motion for a new trial and for amended findings be, and the same is, hereby denied;

And It Is Further Ordered that plaintiff's motion to amend complaint to conform to evidence be, and the same is, hereby denied.

Dated: July 16, 1956.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed July 16, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS

To the Clerk of the above-entitled Court:

Notice Is Hereby Given that Glen Earl Grigg, plaintiff in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered by the Court in said action after trial and on the merits, which judgment was in favor of the defendant, Southern Pacific Company, and against the plaintiff, Glen Earl Grigg, and which judgment was entered on or about the 30th day of March, 1956.

Dated: July 26, 1956.

BARNETT & ROBERTSON, and
CHARLES J. MILLER,

/s/ RODNEY H. ROBINSON,
Attorneys for Appellant.

[Endorsed]: Filed July 27, 1956.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF
POINTS ON APPEAL

To: The Honorable United States District Court,
Northern District, Northern Division, and to
the Honorable Chief Justice and Associate
Justices of the United States Court of Appeals
for the Ninth Circuit:

Appellant respectively states that the following are the points upon which he intends to rely on appeal:

1. The above-entitled court erred in denying plaintiff's motion to remand cause to the Superior Court of the State of California, in and for the County of Sacramento and that the above-entitled Court was, therefore, without jurisdiction to hear and determine said action;

2. The judgment of the above-entitled Court appealed herein is void since the Court was without jurisdiction to try said cause and that said Court should be ordered to remand this action to the Superior Court of the State of California, in and for the County of Sacramento;

3. The Judgment is against the law in that the effect of said judgment provides that an owner of land is not required to exercise reasonable care in the use of his land so as to protect third parties from being injured by said use;

4. The Judgment is against the law since the effect of said judgment is to provide that a common carrier, engaged in the transportation of livestock for hire, has no duty to exercise reasonable care to see that livestock held in said carrier's pens or corrals do not escape or otherwise injure third parties;

5. The Judgment is against the law since the effect of said judgment is to provide that a common

carrier, engaged in the transportation of livestock for hire, can delegate its duty to restrain said livestock in said carrier's pens or corrals, and by so delegating said duty, the said carrier is relieved of all liability to third parties for injuries suffered as a result of said live stock escaping from the carrier's corrals or pens;

6. The Judgment is against the law since the effect of the judgment is to provide that a common carrier, engaged in the transportation of livestock for hire, can hold said livestock in said carrier's pens or corrals for rest and feed and/or transshipment, and that said carrier can absolve itself from any and all liability for injuries caused to third parties by said livestock by simply authorizing the consignee of the livestock to feed, water and restrain the animals;

7. The Judgment is against the law since the effect of said judgment is to provide that a common carrier, engaged in the transportation of livestock for hire, can allow livestock, shipped by said carrier, to be placed in said carrier's corrals by the consignee and, even though said carrier has express knowledge that the consignee is not properly restraining said livestock, the carrier is not liable to members of the general public who are injured when said livestock escapes from the carrier's corrals or pens;

8. The Findings of Fact are not supported by the evidence.

Dated: July 26, 1956.

BARNETT & ROBERTSON, and
CHARLES J. MILLER,
/s/ RODNEY H. ROBERTSON,
Attorneys for Appellant.

[Endorsed]: Filed July 27, 1956.

In the District Court of the United States for the
Northern District of California, Northern Di-
vision

No. 7317

GLEN EARL GRIGG,
Plaintiff,
vs.
SOUTHERN PACIFIC COMPANY, a Corpora-
tion,
Defendant.

REPORTER'S TRANSCRIPT

Appearances:

For Plaintiff:

PHILLIP BARNETT, ESQ.,
RODNEY H. ROBERTSON, ESQ., and
CHARLES J. MILLER, ESQ.

For Defendants:

HORACE B. WULFF, ESQ., and
JOHN V. DIEPENBROCK, ESQ.

Tuesday, March 6, 1956

(Opening statement on behalf of Plaintiff by Mr. Robertson which is omitted from this transcript.)

GLEN EARL GRIGG

the Plaintiff, called in his own behalf, sworn.

Direct Examination

By Mr. Robertson:

Q. Mr. Grigg, where do you reside, please?

A. At the present time?

Q. Yes.

A. 2007 West 75th Street, Los Angeles, California.

Q. And where did you reside at the time of the accident?

A. At the time of the accident my address was P.O. Box 1187, Santa Maria; I believe that is correct.

Q. Now, on the day of the accident, Mr. Grigg, would you tell us where you were proceeding in your automobile?

A. I was on my way to Marysville.

Q. And where were you coming from?

A. San Fransisco.

Q. What time did you leave San Francisco?

A. Oh, I would say approximately four o'clock.

Q. And what highway were you using?

A. It is No. 40, I believe. I am not sure; is it No. 40?

(Testimony of Glen Earl Grigg.)

Q. At about 6:00 o'clock p.m. on Friday, December 17, 1954 [3*] were you operating your vehicle on the Yolo Causeway, I believe it is called, West of Sacramento? A. I was.

Q. And at that time what speed were you traveling, Mr. Grigg?

A. On the causeway I was traveling at 45.

Q. And what kind of an automobile were you operating? A. A 1955 Cadillac.

Q. And did it have any special equipment?

A. It had power steering, power brakes, completely, everything under power.

Q. As you came off the causeway you were proceeding in an easterly direction towards Sacramento; is that correct? A. Right.

Q. As you came off the causeway what lane of traffic were you driving in?

A. I was in the left lane.

Q. Is that the lane nearest the dividing strip between the two freeway lanes of traffic?

A. That is divided—at that point it is divided. The eastbound is that one on the upper part, and the westbound is down approximately 150 feet below it.

Q. And as you were proceeding in the left eastbound lane of traffic towards Sacramento and after having left the causeway at what speed were you traveling? A. Between 50 and 55. [4]

Q. And did you observe any traffic to your front at that time?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Glen Earl Grigg.)

A. Yes; there was a pick-up in the right lane and I had just gone by it or was just gradually pulling away from it when the accident happened.

Q. And what was the condition of the weather at that time as to whether it was light or dark?

A. Well, it was getting dark, 6:15, but the visibility was good.

Q. And were you able to see light from Sacramento at that time? A. Yes.

Q. Were you able to see a sign from the El Rancho at that time?

A. Well, that I couldn't say, because I don't think I even looked at it.

Q. And did you overtake on the left the Ford pick-up truck you mentioned which was on your right?

A. Yes; and was just drawing away from it.

Q. And as you were drawing away from it could you see it in your rear view mirror?

A. No; because it was over in the right lane and I hadn't gotten that far ahead of it.

Q. Now, approximately how far had you traveled from the causeway until you came across these mules? [5]

A. I would say approximately a mile.

Q. Now, as you were proceeding east toward Sacramento in the left lane was your attention directed to some animals on the highway?

A. As I came around the curve; yes.

Q. Tell us what you saw, please.

(Testimony of Glen Earl Grigg.)

A. As I picked them up in my lights making the curve I could see these animals coming up over the embankment onto the highway.

Q. Could you tell us how many you saw coming up over the embankment?

A. I don't know, there were two of them straight in front of me, I couldn't miss them.

Q. Did they come from your left to right?

A. They came from the left.

Q. Was there a deep gorge—is there a deep gorge along the left embankment of that freeway?

A. I beg your pardon?

Mr. Wulff: It isn't necessary to lead him.

Q. (By Mr. Robertson): Is there a deep gorge?

A. Yes; there is quite a depression there between the two lanes of traffic, between the east and westbound. It is, oh, maybe 20 feet, something like that.

The Court: Mr. Robertson, try to avoid leading questions.

Mr. Robertson: I didn't hear you, your [6] Honor.

The Court: Mr. Wulff raised the objection that you are asking leading questions and I asked you to avoid that.

Q. (By Mr. Robertson): When you saw these mules on the highway, what did you do, Mr. Grigg?

A. Well, I immediately tried to stop.

Q. And at the time you first saw them do you know about how far away they were from you?

A. I would say approximately 50 feet.

(Testimony of Glen Earl Grigg.)

Q. And when you saw them what did you do, when you saw them 50 feet away, as you said, what did you do? A. I tried to stop.

Q. Did you apply your brakes?

A. I certainly did.

Q. Now, at that moment when you first saw them 50 feet away did you look in your rear vision mirror?

A. No; I didn't have time, I was trying to stop.

Q. Now, Mr. Grigg, after you applied your brakes what happened?

A. I hit one mule with my left fender and the other one, as I came into him, he reared up and came right over the hood right into the windshield.

Q. And was the windshield shattered?

A. Broken all up, every bit of it.

Q. And did your car come to a stop?

A. Yes, sir. [7]

Q. And at the time of the impact, Mr. Grigg, did any part of your body strike any part of your car? A. Will you repeat that?

Q. At the time of the impact with the mule or the mules do you recall any part of your body striking your car?

A. Well, my whole body went forward at the impact, bent the steering wheel.

Q. Now, after your car came to a stop what did you do?

A. I got out of the car and by that time there were other cars coming up. In fact one car rolled

(Testimony of Glen Earl Grigg.)

into me, just barely touched me before I got out. I mean there was an impact from the rear.

Q. Did you observe another collision with the red truck?

A. I beg your pardon, I didn't hear you.

Q. Did you observe any other collision? You said after you got out a car rolled in near your back. Now, did you observe the red truck?

Mr. Wulff: That is incompetent, irrelevant and immaterial, your Honor. He is out of the car.

The Court: It may have something to do with the property damage.

Mr. Robertson: Yes.

A. Would you come over closer, please?

Q. You can't hear?

A. No; I can't hear too well. That is the [8] trouble.

Q. As your car was coming to a stop or after it stopped did you observe any collision of the red truck with mules or with your car?

A. That was off to my right and back of me. I couldn't see it.

Q. Did you feel any impact on the right side of your car? A. Yes; I did.

Q. After you got out of your car did you see any damage to the rear of your car?

A. Yes; the right rear bumber, the tip was knocked off, and the right quarter panel was demolished, and the deck, the rear deck was bent.

Q. And after you got out of your car was there a red Ford truck near?

(Testimony of Glen Earl Grigg.)

A. There was a Ford truck right back of me.

Q. And that was a truck that was owned by Stansel?

A. That is right.

Q. Now, Mr. Grigg, when you got out of the car did you see any mules or horses on the highway or near your car?

A. There was two of them; one of them just at the back of my car, the one I hit with the left fender, and the other was lying approximately at the front fender or close to it.

Q. After you got out of the car did you observe anything wrong with your body physically?

A. Yes; there was a lot of blood on my hand and my face was [9] bloody.

Q. Were you cut?

A. Yes. My index finger, I guess you call it the index finger, was cut from one end to the other.

Q. Indicating the right index finger?

A. Well, yes. And the knuckle on the second finger was cut loose and lying back.

Q. And you were bleeding from that?

A. Bleeding from that. And also bleeding from my face. There was a piece of glass one of the boys pulled out that was sticking right in my forehead.

Q. And what did you do as soon as you got out of your car and you noticed these things, Mr. Grigg?

A. Well, I was there for quite a few minutes until the—they cleared the trucks off and then the Highway Patrol, one of the men from the Highway Patrol, drove me up to the Receiving Hospital.

(Testimony of Glen Earl Grigg.)

Q. Did you talk to anyone at the scene of the accident right after it occurred, at all, Mr. Grigg?

A. The only one I remember—I was pretty badly shaken up—the only one I remember, I believe his name was Silverman—was it Silverman who had the Buick?

Q. And did you talk to the Highway Patrol officer? A. He handed me his card.

Q. And what was your general condition as you can describe it [10] at that time? Were you conscious or unconscious?

A. Yes; I was conscious, but I was badly shaken up.

Q. And you were shortly thereafter removed to the emergency hospital by the highway patrol?

A. Yes; as soon as the cars were taken off of the highway, then they took me up.

Mr. Robertson: I am showing counsel some pictures which we previously have shown to them.

Mr. Wulff: I have never seen these before.

Mr. Robertson: I have shown them to your associates.

Mr. Wulff: I beg your pardon.

Mr. Robertson: I understood we might be able to arrive at a stipulation without laying the foundation for them.

Mr. Wulff: We have no objection. The photographer would testify to these if he was present in court.

Mr. Robertson: Yes.

Your Honor, I have five pictures taken on Sept.

(Testimony of Glen Earl Grigg.)

27, 1955, at 11:45 a.m. of the eastbound freeway, which pictures are numbered, and I would like to introduce them at this time in evidence as Plaintiff's Exhibit 1 and then A, B, C, D and E. Would that be satisfactory?

The Court: I prefer to have them numbered separately.

Mr. Robertson: All right, 1, 2, 3, 4 and 5, your Honor?

The Court: All right. [11]

Mr. Robertson: And as I put them in, your Honor, I can read——

Mr. Wulff: How many are there?

Mr. Robertson: Five. And as I put them in, your Honor, I can read the photographer's report as to where each picture was taken from, the angle, and so forth.

All right, the first photograph, which is numbered 11346-1, is described by the photographer as "Camera on east end of bridge 22-103R, view facing east."

The second photograph, numbered 11346-2, which is being introduced as Plaintiff's 2 in evidence, "Camera on U.S. 40, fifty yards east of bridge No. 22-103R, view facing east."

The next picture, 11346-3, which is being offered as Plaintiff's 3 in evidence, "Camera on U.S. 40, 100 yards east of bridge No. 22-103R, view facing east."

The next picture, 11346-4, being offered as Plain-

(Testimony of Glen Earl Grigg.)

tiff's 4 in evidence, "Camera on U.S. 40, 150 yards east of bridge No. 22-103R, view facing east."

And the last photograph at this time, 11346-5, offered as Plaintiff's 5 in evidence, "Camera on U.S. 40, 250 yards east of bridge No. 22-103R, view facing west."

The Court: Give me the notation on that first one again, please.

Mr. Robertson: Yes, your Honor. "Camera on east end of bridge No. 22-103R, view facing [12] east."

Would you like me to repeat any of the others?

The Court: No. I just didn't get the location of the camera on the first one.

(The five photographs last described were thereupon marked Plaintiff's Exhibits Nos. 1 through 5, inclusive, and received in evidence.)

Mr. Robertson: If your Honor desires, I can introduce this letter for identification, if it will help.

The Court: I don't think it is necessary.

Mr. Robertson: All right. Now, I have an aerial photograph, your Honor—I will get the legend on it—"Verne W. Cartright, Photographer, copy of aerial mosaic of south of Sacramento freeway and vicinity; date flown, January, 1954; scale, 1 inch equals 340 feet."

I have previously shown this to Mr. Jack Diepenbrock.

Mr. Wulff: Is that date correct; January, 1954, counsel?

(Testimony of Glen Earl Grigg.)

Mr. Miller: That is correct, Mr. Wulff.

Mr. Wulff: I have no objection to it showing the conditions existing as of January, 1954.

Mr. Robertson: Pardon me?

Mr. Wulff: I have no objection to it as showing the conditions existing as of January, 1954.

Mr. Robertson: Yes. Now, insofar as Plaintiff's Exhibits 1 through 5, the photographs, Mr. Wulff, are you prepared to stipulate that those photographs demonstrate the [13] conditions as existing at the time of the accident? That is, the roadway?

Mr. Wulff: As far as Plaintiff's Exhibits 1, 2, 3, 4 and 5, you said they were taken in December, did you not, 1954?

Mr. Robertson: No; they were taken September 27, 1955.

Mr. Wulff: Aren't there some new buildings there? They show the general condition, yes; but so far as buildings are concerned and things by the road and things like that, there may have been some changes ten months later.

I don't know what the full purpose of your introduction is. If it is to show the general condition of the road, that I will stipulate to.

Mr. Robertson: The stipulation I asked for is would you stipulate that these pictures fairly depict the condition of the road and the conditions demonstrated in the photographs as to the road edges and the ditch down between the two freeways.

Mr. Wulff: As far as the construction of the freeway is concerned, I will so stipulate.

(Testimony of Glen Earl Grigg.)

Mr. Robertson: Very well. Thank you, Mr. Wulff.

Now, your Honor, at this time I wish to offer in evidence the aerial photograph that we have here which was prepared by Verne Cartright on a mission flown January, 1954, scale 1 inch equals 340 feet, as Plaintiff's 6 in evidence. [14]

Mr. Wulff: Your Honor please, I object to that except to the extent that it shows the conditions existing at the time the photograph was taken, which is about ten months prior to the accident.

The Court: Obviously that is what it has to show. I will admit all these photographs as heretofore indicated, as Plaintiff's Exhibits 1, 2, 3, 4, 5 and 6. Naturally the Court will accept them only as showing the conditions at the time they were taken.

Mr. Robertson: Yes. We are only going to use them for limited purposes, your Honor.

Now, in order to save time I am going to ask counsel if he is prepared to stipulate that the aerial photograph does demonstrate the general location of the freeway, highway 40, as relates to the Southern Pacific track right of way, and as relates to the position of the freeway in relation to the Southern Pacific corrals on the aerial photograph?

Mr. Wulff: None of those objects have been changed as far as locations are concerned?

Mr. Robertson: Yes. Stipulated that the location of the freeway is as appears on the aerial photograph, the location of the Southern Pacific

(Testimony of Glen Earl Grigg.)

right of way tracks, the location of the Southern Pacific stockyards.

Mr. Wulff: Counsel, there are other tracks shown in that besides the Southern Pacific tracks. The Southern [15] Pacific tracks show there but there is also the Port District tracks shown there, the Sacramento Northern tracks shown there. I think as far as the track layout is concerned, I know of no change.

Mr. Robertson: And also——

The Court: Gentlemen, does anybody have a map in this matter?

Mr. Wulff: No; I haven't

Mr. Robertson: Pardon me, your Honor.

The Court: Do you have a map in this matter?

Mr. Robertson: No, your Honor. And also the spur line running out from a generally northerly direction in a generally southerly direction.

Mr. Wulff: That is not a spur line, that is the Port District track. That is not owned by the Southern Pacific

Mr. Robertson: Well, whatever it is.

Mr. Wulff: That is not owned by the Southern Pacific. That is a track connecting the Southern Pacific and the Sacramento Northern tracks with the Port District's tracks, owned and operated by the Port District.

Mr. Robertson: But those things existed at the time of the accident.

Mr. Wulff: I think the tracks and the freeway

(Testimony of Glen Earl Grigg.)

depicted on this aerial conform to the conditions existing on the day of the accident. [16-17]

Mr. Robertson: And that is so stipulated?

Mr. Wulff: Yes.

Mr. Robertson: Thank you.

The Court: Gentlemen, why can't we have a map in this matter to show these things? I don't care how you get it drawn up, but I am no reader of aerial photographs, and things look from the air a lot different from what they look on the ground.

Mr. Robertson: May it please the Court, as far as the detailed map of the entire area, we are not using this photograph to show any exact route which the mules took to get from one place to another, we are merely trying to show the position of the S. P. corrals as relates to the highway, and also the general build-up of the houses and so forth in the area, your Honor.

The Court: Why can't it be done by the way of a very simple map?

Mr. Wulff: We don't know the route the cattle took, your Honor.

The Court: I am not talking about that. I am talking about the general lay of the land. You know where the railroad tracks are, you know where the highway is, you know where the streets and the roads are, and you know where the corral where these animals must have been, or at least where they were supposed to have been. [18]

Mr. Robertson: Mr. Miller tells me we can get a U.S. Survey map, your Honor, which would show

(Testimony of Glen Earl Grigg.)

these things that you just indicated, and we will try to get one at the noon hour, may it please the Court.

The Court: All right.

Mr. Robertson: So we will offer this then as Plaintiff's Exhibit 6 in evidence. I believe it has already been introduced; is that correct?

The Court: That is right.

(The aerial photograph previously described was marked Plaintiff's Exhibit No. 6 in evidence.)

Q. (By Mr. Robertson): Now, Mr. Grigg, I will show you Plaintiff's Exhibit I in evidence, a photograph taken from west towards the east of the eastbound freeway, and ask you if that photo depicts the general condition of the road on the day the accident occurred? A. It does.

Q. Now, Mr. Wulff, would you like to come up here? I am going to ask him to mark this.

A. As near as I can judge——

Q. Just a minute, Mr. Grigg. Now, will you please mark on the photograph where you saw the mules on the highway? I suggest you just make a circle where you first saw them.

Mr. Wulff: May I just ask one question, your Honor, in that regard? [19]

The Court: Yes.

Mr. Wulff: Before you mark this, please. Do you have in mind any physical objects on or near the road which refreshes your memory as to the location?

(Testimony of Glen Earl Grigg.)

A. No; it is the going around the curve when my lights come around this way and picked them up, approximately right in this corner here (indicating).

Q. (By Mr. Robertson): Will you please mark that on the road where you saw it with a circle?

A. (Witness marks on photograph.)

Q. You were present when these pictures were made; is that correct, Mr. Grigg?

A. Pardon?

Q. Were you present when these photos were taken? A. Yes; I was present.

Mr. Robertson: I will mark that "G-1," is that all right?

The Court: Yes.

Q. (By Mr. Robertson): Now, Mr. Grigg, this is the point where you say they first came up on the highway?

A. As near as I can judge from the picture, that is right.

Q. Now, will you make two circles on the photo, Plaintiff's 1, where the mules were on the highway, when you first started to apply your brakes, or where you hit them?

A. Approximately in the same position. When the lights hit them they just stopped right in front of me. The mules, after [20] they were on the highway, didn't move.

Q. Were they in the center of the——

A. One of them was in the center and one of them was a little bit to the left.

(Testimony of Glen Earl Grigg.)

Q. Will you mark that?

A. I would say approximately in the center (marking) as near as I can get to it, and the other one would be right closer to the edge here (marking on photograph).

Mr. Robertson: We will draw a line out and mark that "G-2" (marking on photograph).

Q. Now, the photo, Plaintiff's Exhibit 1, Mr. Grigg, demonstrates at the final part of it the road curving to the left?

A. That is right.

Q. Now, does Plaintiff's 2 show the area where you actually struck the mules more clearly?

A. This is approximately the same spot, right here. This is about the same spot, right about here, right around the corner. I couldn't get it any closer.

Q. Now, Mr. Grigg, after your car came to a stop will you please tell us what the position of your car was in relation to the eastbound freeway?

A. As it come to a stop it was approximately a 45 degree angle pointing to the left.

Q. Would you be kind enough to mark on Plaintiff's Exhibit 1, the photograph, with a rectangle with a pointed end on one [21] end to show the front of the car, draw on the photo where your car was after it came to a stop?

A. It would be approximately at this angle, over, naturally, farther; it would be approximately 45 degrees (marking on photograph).

Q. Would you draw the point for the front and a square for the back, make a box out of it?

A. (Witness draws on photograph.)

(Testimony of Glen Earl Grigg.)

Mr. Robertson: We can mark that, counsel, "G-3" (marking on photograph).

Mr. Diepenbrock: All right.

Mr. Wulff: What number exhibit is that?

Mr. Robertson: Plaintiff's 1.

The Witness: Pardon me, may I have that for a moment? The back of this was extending over into this line.

Q. Well, will you draw a regular box, not just one line, but two lines and a point to the front?

A. I would say it was more or less this angle (marking on photograph). This sets approximately about a 45 degree angle.

Mr. Robertson: Counsel, I will just put a little point in front, is that all right? (Marking on photograph.)

Q. So, Mr. Grigg, is it true then that the rear part of your car was over the center white line?

A. Yes. [22]

Q. Would you describe, please, the physical condition of your car after you had stopped on hitting the mules?

A. You will have to get over here.

Q. You can't hear. Would you describe the physical damage to your car immediately after you got out, after it had struck the mules?

A. The hood was badly bent, the front fenders were bent, the windshield was out, the turret top was crushed in about——

Mr. Wulff: If the Court please, I think the car was repaired, the cost of repairs is the problem we

(Testimony of Glen Earl Grigg.)

have. There is no question it was damaged. Secondly, I think he sold it thereafter. I think those data would be what the Court is more interested in than these items.

Mr. Robertson: It is admissible, if it please the Court, to show the force of impact and the resulting damage to the man himself. That is why I want to show the amount of damage to the automobile, to show the force of the impact.

The Court: The objection is overruled.

Q. (By Mr. Robertson): Proceed with describing the damage to the car, Mr. Grigg.

A. The turret top was bent in about 12 or 14 inches, and the rear right quarter panel was badly damaged, and the rear bumper, the right hand tip was badly damaged, and the deck lid was bent and the back panel below the deck lid was bent. The steering wheel was bent. [23]

Q. You subsequently caused that car to be repaired, Mr. Grigg?

A. I beg your pardon?

Q. You subsequently caused the car to be repaired?

A. Yes.

Q. And where were those repairs made?

A. They were made at Roemer & Rubel in Santa Maria.

Q. And how much did you pay for the repairs, Mr. Grigg?

A. The bill there was some fifteen hundred and some odd dollars, but there was a grille added to that later that they don't have the bill for, it is

(Testimony of Glen Earl Grigg.)

somewhere. I had that done in Los Angeles at the Cadillac Motors. I can get the bill for that.

Q. How long did it take to repair the car?

A. Over three months.

Q. Do you recall how much you paid for the grille after the other repairs?

A. I don't. I can get that price for you. I can get that through any Cadillac agency, but I don't have it, and I don't remember the exact figures.

Q. Do you have any recollection of the approximate amount?

A. I wouldn't want to state—

Mr. Wulff: Objection, your Honor. He has testified he has no recollection of the price.

The Court: Well, I am not interested in any approximate amount. Those figures can be obtained with complete [24] accuracy, and there is no necessity for guessing.

Q. (By Mr. Robertson): Now, Mr. Grigg, when you were taken to the emergency hospital by the Highway Patrol officer was any treatment given to you there?

A. They cleaned the wounds and bound them up, but they wouldn't—they said I had to have a surgeon to do the work on my hand.

Q. And did you go to a surgeon?

A. I took a taxi and went to the Mercy Hospital.

Q. Was this on the same evening of the accident? A. Yes.

Q. Do you recall the name of the doctor who treated you there? A. Draper.

(Testimony of Glen Earl Grigg.)

Q. Draper?

A. Is that the name? Draper, I believe it is.

Q. Do you recall, please, what treatment was given you there at the emergency hospital?

A. Well, they X-rayed me, they called an X-ray man to come down to the Hospital, and the doctor came in and checked the X-rays and he sewed it up. At first he thought the tendon was cut, but it wasn't, and between the two fingers I had 17 stitches.

Q. And was any other treatment rendered to you?

A. He gave me medicine to stop the pain. [25]

Q. What about your forehead? That was cut, wasn't it?

A. Yes; but they stopped the blood on that at the receiving hospital.

Q. Where did you go from the Mercy Hospital, Mr. Grigg?

A. The boy that I raised came down from Marysville and took me up to his home.

Q. Did you get to his home in Marysville on the night of the accident?

A. Yes; about one o'clock.

Q. And what did you do then?

A. Went to bed.

Q. Went to bed. And how long did you remain in bed at Mr. Pekema's home?

A. Well, I got up the next morning, as far as that is concerned. I was there, I don't remember whether it was two or three days.

(Testimony of Glen Earl Grigg.)

Q. And following that, Mr. Grigg, did you return to Los Angeles, your home?

A. I went to San Francisco first and had Dr. Henning look me over, and then I went to Los Angeles.

Q. Would you describe, please, what complaints you had as to your body following the treatment at Mercy Hospital the night of the accident?

A. On my way to Los Angeles my back and hip got to bothering me pretty bad and I couldn't straighten up, so I stopped at [26] a chiropractor in Ventura and he gave me an adjustment, and I came back several days later and went to his office and he wasn't there, so I went to another man. So there were two treatments I had there.

Q. Did you have the stitches subsequently removed from your hand?

A. I beg your pardon?

Q. Did you have the stitches subsequently removed from your hand?

A. Yes. Dr. Randall in Santa Maria took those out.

Q. And did that hand ultimately heal up?

A. Eventually; yes.

Q. And how long did that take?

A. The soreness—the soreness was in there for several months.

Q. And have you any scars on that hand now?

A. Yes; scars on both fingers.

Q. Indicating your right index finger and your right second finger? A. Yes.

(Testimony of Glen Earl Grigg.)

Q. Was there a scar on your forehead from this accident? A. Very slight.

Q. Now, Mr. Grigg, following the accident did the condition in your hip and back improve?

A. I am sorry.

Q. Following the accident did the condition in your hip and [27] back improve?

A. My back is all right, but the hip isn't.

Q. The hip did not?

A. No; it did not. It gradually got worse.

Q. Be sure and speak up so the reporter can get down what you are saying. And tell us, please, what kind of pain or symptoms, if any, you noticed in your hip?

A. Well, there is a catch in the muscle here.

Mr. Diepenbrock: Is this the present time?

A. And the nerve.

Mr. Diepenbrock: Excuse me just a moment. May we have the period of time of these complaints?

Q. (By Mr. Robertson): When you returned from Marysville to Los Angeles after the accident—about how soon after the accident did you go back down to Los Angeles?

A. I would say approximately a week.

Q. And the accident happened on the 17th. Were you down there on the Christmas holidays?

A. Yes.

Q. All right. Now, over the Christmas holidays in Los Angeles, tell us, please, what your general condition was, how did you feel?

(Testimony of Glen Earl Grigg.)

A. Well, I was sore and bruised, and I thought it was just bruised and I would get over it, but my hip started to bother me and it has gradually grown worse. [28]

Q. Did you subsequently go to see Dr. Henning in San Francisco after the Christmas holidays?

A. I did.

Q. And about when did you go there?

A. Well, I think the early part of January, if my memory is right.

Q. In 1955? A. Yes.

Q. And did Dr. Henning examine you there?

A. Yes; he examined me and also I had a series of X-rays taken.

Q. And at the time you saw Dr. Henning in January, 1955, what was the condition of your hip as far as you knew?

A. It wasn't paining me at the time very much. He gave me a general check-up, and he said "I want to check that hip." I told him it had bothered me for a while.

Q. Do you have any particular limitation of movement in your leg or hip?

A. Yes. I had catches in it when I sit on something low or get it in a position that wasn't straight.

Q. Now, Mr. Grigg, did you see Dr. Henning again after January, 1955?

The Court: I think we will take the morning recess at this time.

A. Yes. [29]

(Testimony of Glen Earl Grigg.)

The Court: We will take a brief recess at this time.

(Recess.)

Mr. Robertson: May it please the Court, Mr. Wulff has stated there is no objection if we draw a circle on the aerial photograph, Plaintiff's Exhibit 6, where the Southern Pacific corrals are and a circle on the freeway where the accident happened.

Mr. Wulff: The corrals aren't that big. I don't know who owns the land that you marked there.

Mr. Robertson: I made this circle as the general area of the corral and the general area of the accident.

Q. Mr. Griss, you stated you saw Dr. Henning in January of 1955, when he X-rayed the hip or had it X-rayed? A. Yes.

Q. Now when did you next see Dr. Henning?

A. Well, I think it was in February, March and April I went there.

Q. You saw him on successive occasions?

A. That is right.

Q. And on each of those occasions what were you complaining of to the doctor at that time?

A. Mostly soreness.

Q. Where? A. In my hip.

Q. And, Mr. Grigg, during this period of January through [30] April of 1955, did you attempt any activities or work?

(Testimony of Glen Earl Grigg.)

A. No, I haven't done any work. I have some cattle, but I didn't do any work with them.

Q. Did you try to do any work?

A. I tried to take care of the cattle for a couple of days and I couldn't do it.

Q. Tell us what you tried to do then and about when?

A. Well, in April I tried to go out and just check the cattle over, walk out on the permanent pasture a very short distance, but when I got back I was so sore I had to lie down.

Q. Where were you sore? A. In the hip.

Q. Mr. Grigg, did you attempt during this period, January to April, 1955, to start a new business?

A. I was on my way in December when this happened up to Marysville to talk to the boy about opening up a place.

Q. What type of place?

A. Automobile agency.

Q. How long were you in the automobile agency business prior to the accident, Mr. Grigg?

A. Approximately 36 years.

Q. And during that period of time——

Mr. Wulff: Your Honor please, I object to any evidence of loss of business, since it is not alleged, not an issue in this case. [31]

Mr. Robertson: It is not put in for the purpose of showing special damages as such, but is put in for the purpose of showing limitation, the man

(Testimony of Glen Earl Grigg.)

being ill, and not being able to move about or do anything, your Honor.

The Court: I will admit it for the sole purpose of showing the loss of earning power.

Q. (By Mr. Robertson): Now, Mr. Grigg, you say you were in the automobile agency business for 36 years?

A. Approximately, yes.

Q. During that period did you own agencies?

A. Yes.

Q. Take the period—you had an operation in February of 1954 on your stomach, isn't that correct?

A. Yes.

Q. And it was about that time that you closed your business in Santa Maria?

A. In March, after my wife passed away I started to close it.

Q. In the year prior to that, in the year 1953, did you operate the agency in Santa Maria?

A. Yes, I did.

Q. Describe the type of physical plant you had there, what your duties were, and what you did?

A. Well, I had a DeSoto-Plymouth and a very large used car business.

Mr. Wulff: If your Honor please, this is incompetent, [32] irrelevant and immaterial. He gave this business up in March, 1954, and the accident occurred in December, '54.

The Court: I am going to sustain the objection to what happened in 1953. It is obvious there has been a physical change in the man, a physical

(Testimony of Glen Earl Grigg.)

change in his home, so we are going to have to talk about what happened after that.

Mr. Robertson: May it please the Court, the evidence will show, it is in the depositions now, that the defendant claims the condition Mr. Grigg has now is a pre-existing condition and is not as a result of the accident, and I wish to produce evidence to show what his activities were before the accident to show that he had no difficulty.

The Court: Well, that is not before me at the present time. The record before me at the present time is he had an operation in 1954 and his wife passed away in the spring of 1954 and immediately thereafter he voluntarily started to close up the business he had at that time.

Mr. Robertson: The evidence also shows, your Honor, that on the day of the accident he was on his way to negotiate with Mr. Pekema the opening of another business.

The Court: That has nothing to do with what happened in 1953. That is what I want to do, is look forward and not backwards.

Mr. Robertson: I think we are entitled to show the man's condition of health before the accident, and what it is [33] now.

The Court: Well, suppose he had 1,500 automobile agencies in 1953 and he disposed of all of them and in the meantime he had two serious situations develop; one, he has a very serious operation, by your own opening statement and by his testimony, and the other is by the loss of his helpmate,

(Testimony of Glen Earl Grigg.)

and it changed his entire course of life. Now let's talk about what happened after that, not what happened before these things occurred. You, yourself, brought these matters into the record.

Mr. Robertson: Yes, your Honor, but I am not attempting to show loss of money, I am trying to show that he worked in and about his business for the year before the accident and he was in good health and now he can't work.

The Court: What you are attempting to show is that he worked in and about his business prior to the time he had a very serious operation and prior to the time that he lost his wife.

Mr. Robertson: All right, then, I want to show that after his operation he resumed normal activities.

The Court: All right, show that then.

Q. (By Mr. Robertson): Mr. Grigg, you had this operation on your stomach by Dr. Henning in February of 1954? A. January.

Q. January. When were you discharged from the hospital? [34]

A. I was there about 15 days.

Q. And what did you do after you were discharged? A. Went back to work.

Q. Where did you go back to work?

A. To my own business.

Q. Where? A. Santa Maria.

Q. What did you do there at that place of business?

(Testimony of Glen Earl Grigg.)

A. I directed the whole operation and did 50 per cent of the selling.

Q. How many hours a day would you work?

A. Anywhere from 10 to 14.

Q. Did the fact that you had this stomach surgery in any way affect your ability to work in your business after the operation? A. No.

Q. Did you play golf after the operation?

A. Yes.

Q. And how often would you play golf?

A. Oh, I would play golf, sometimes I would go for a month without playing, and then maybe I would play three times a week.

Q. And how many holes would you play when you played golf? A. As a rule 18.

Q. And did you do any hunting following the operation? [35]

A. Yes, I did. I was pheasant hunting in Marysville in November before the accident in December.

Q. And how many days did you hunt?

A. Three.

Q. And can you tell us, please, how far, and how long you walked during this period of hunting?

A. Well, you cover quite a bit of ground, after the first day, and they get to be scarce you cover quite a bit of ground. I would say in the last day we hunted there was about 300 acres and we traveled all over it.

Q. Did you have any difficulty moving about while hunting in the fields? A. No.

(Testimony of Glen Earl Grigg.)

Q. Did your hip or leg or back give you any trouble? A. No.

Q. Did your stomach give you any trouble?

A. No, sir.

Q. Have you had any trouble with your stomach since the accident? A. No, I have not.

Q. Now, Mr. Grigg, you say you saw Dr. Henning in January, February, March and April. When did you again see him?

A. It was either in September or October; I haven't the exact figures.

Q. In 1955? [36] A. Yes, sir.

Q. And during the period of approximately May and June of 1955 to September you were in Europe? A. That is right.

Q. Will you state the purpose of your going abroad, Mr. Grigg?

A. Well, for two reasons, I had two reasons. One of them was pleasure, and the other one I was investigating the foreign car market.

Q. For what purpose?

A. With the idea of handling them over here.

Q. Now, what was your general condition of your hip while you were in Europe, Mr. Grigg?

A. It was—I would say it was the last of June or on the first of July it got bad, I was in Germany, I had to get a cane, and I have been using it ever since.

Q. You didn't use a cane before that?

A. No.

(Testimony of Glen Earl Grigg.)

Q. Then you returned from Germany, is that correct, from Europe to the United States?

A. Yes, sir.

Q. And you again went to see Dr. Henning?

A. I did.

Q. This was in October or November, 1955?

A. Yes. [37]

Q. And what did you complain of at that time to Dr. Henning?

A. I told him what had happened to my hip, that it was getting worse all the time, and he had some more X-rays made and had them checked and he gave me some medicine to take to ease the pain.

Q. Did he prescribe any treatment or give you any treatment?

A. No, he didn't prescribe treatment, because it was in the ball joint, and there is no way of treating it without surgery.

Q. Did he prescribe limitation of activities?

A. Yes, he told me not to do too much walking, and be sure to use the cane to keep my weight off of it.

Q. What have been your activities as to golf—

The Court: Let me get this straight. When is this now that the doctor prescribed this?

A. This was after I came back from Europe, I got back some time after the middle of September.

The Court: All right, proceed.

Q. (By Mr. Robertson): What have been your activities since the accident in relation to golf,

(Testimony of Glen Earl Grigg.)

hunting or working, Mr. Grigg? A. None.

Q. And Mr. Grigg, after October or November, 1955, have you gone to any other doctor in regards to your left hip?

A. Yes, Dr. Sanderson, I went to him several times. [38]

Q. And how many times did you visit him?

A. I think I have been to him four times.

Q. And what has he done, if anything, for your hip?

A. He has had a number of X-rays taken of it and watched the progress of it.

Q. Has he indicated any treatment?

A. No, nothing outside of surgery.

Q. Now what is your present physical complaint insofar as your hip is concerned, Mr. Grigg?

A. The joint is sore, the nerve in front of my leg hurts and the pain goes all the way down my leg, and at times I can't get up and down.

Q. Do you have difficulty operating a car?

A. No, because I don't use that foot in operating a car.

Q. Do you have difficulty in walking?

A. Yes.

Q. Do you limp?

A. I can't walk without a cane.

Q. This pain you describe, is it constant or does it come and go? A. Spasmodic.

Q. Are you taking any medication for that?

A. I take some medicine Dr. Henning gave me for pain, relief of pain.

(Testimony of Glen Earl Grigg.)

Q. And have you any other complaints as a result of [39] accident other than the hip at the present time? A. Outside of the hip?

Q. Yes. A. No, none at all.

Q. And now, Mr. Grigg, when this mule struck—you say it came through your windshield?

A. One of them's head came all the way through the windshield and hit me in the face, and I had grass stains from my shoulder right straight down to my hip.

Q. You say it hit you in the face and you had grass stains? A. Yes.

Q. Mr. Grigg, did you have any difficulty with your teeth after this accident?

A. Yes, my teeth got loose and I had to have them taken out.

Q. How many of your teeth?

A. My upper front teeth, I think there were six or seven of them. I had a partial plate.

Q. In the front of your mouth? A. Yes.

Q. Before the accident were those teeth loose or did you have trouble with them?

A. No. I had them for several years and they didn't bother me at all.

Q. And who took the teeth out and about when was it done?

A. Dr. Ken Mar in Stockton. [40]

Q. Do you know how much that cost, Mr. Grigg?

A. Well, he made the upper set, and after I got back from Europe I had to have them done over. I think it was 150 the first time and 75 the second.

(Testimony of Glen Earl Grigg.)

Q. Mr. Grigg, how do you feel now and what are your present complaints?

A. My complaint is lack of locomotion in my hip.

Q. Are you suffering any pain there now in your hip?

A. There is constant pain in my hip when I am using it.

Q. Do you have any difficulty sleeping?

A. Yes, I do. I can't lie on my left side.

Mr. Robertson: Now, your Honor, I have shown counsel a series of bills for doctors, X-rays, dentists and the like, and I would like to see if we can't stipulate rather than having the witness testify to each one.

Mr. Wulff: The only objection I have is to Dr. Sanderson's X-ray bill there because I understand he merely examined him for testimony purposes.

Mr. Robertson: Is this one here all right (indicating)?

Mr. Wulff: I have no objection.

Q. (By Mr. Robertson): All right. Now, Mr. Grigg, I will show you a bill of Roemer & Rubel, Santa Maria, for car repairs in the total amount, a three page document, of \$742.16 for parts and \$813.06 for labor, total bill \$1,555.22. Is that the bill that you received from that agency? [41]

A. That is right. The grille is not included in this.

Q. Did they repair your car? A. Yes.

Q. And you paid them?

(Testimony of Glen Earl Grigg.)

A. Yes, that is the payment.

Q. And the grille is not included?

A. No, the grill is not included.

Mr. Robertson: I will offer that as Plaintiff's Exhibit next in order, your Honor, counsel having inspected it.

The Court: Plaintiff's Exhibit 7.

(The document referred to was marked Plaintiff's Exhibit No. 7 in evidence.)

Mr. Robertson: Now, may it please the Court, I have a series of bills put in chronological order as to the dates of various hospital, X-ray technicians——

A. Pardon me, but Dr. Sanderson's bill is not in there. It hasn't been paid.

Mr. Robertson: And I am wondering if we can put them in as one exhibit. Counsel has examined them, your Honor. I have taken out Dr. Sanderson's X-ray, and he appears to have no objection to them, and the total is \$420.62.

Q. I will ask you, Mr. Grigg——

Mr. Wulff: What is the total amount?

Mr. Robertson: My totals shows it to be \$420.62.

Q. I will ask you, Mr. Grigg, to quickly look at this [42] batch of bills and ask you if you received those and they were paid?

A. Yes, they are all paid.

Mr. Robertson: May I submit these as one exhibit, your Honor?

The Court: Plaintiff's Exhibit 8.

(Testimony of Glen Earl Grigg.)

(The documents referred to were marked Plaintiff's Exhibit No. 8 in evidence.)

Q. (By Mr. Robertson): Now, in that group of bills of Dr. Henning, and the dentist, Dr. Mar, the Mercy Hospital, Dr. Draper, Dr. Randall, J. C. Sewell, the Osteopath, G. J. Myers, the Osteopath, Dr. Case, the dentist, and Dr. O'Neill, the X-ray man, and then certain medicines, is that correct?

A. That is right.

Q. Now you have not yet received a bill from Dr. Sanderson? A. No, I haven't.

Q. Now, Mr. Grigg, how long had you owned the 1955 Cadillac coupe that was in this accident prior to the accident?

A. I bought it on the 8th day of December and wrecked it on the 17th.

Q. Mr. Grigg, do you recall what you paid for the automobile?

Mr. Wulff: If your Honor please, that is immaterial. The cost of repairs are involved here.

Mr. Robertson: I am going to show depreciation by virtue of the wreck, your Honor. It was a brand new car, [43] he had it for a few weeks, it was wrecked, and repaired and sold at a depreciated loss.

The Court: We know with any car the very minute you take it off the lot, you take it back they won't pay you the price you paid for it.

Mr. Robertson: That is true, your Honor, but a car that has been wrecked, a 1955 Cadillac in De-

(Testimony of Glen Earl Grigg.)

cember of '54, it is a '55 Cadillac, it becomes a question of materiality. The testimony would be by offer of proof that he paid "X" dollars for it and he was caused to sell it for "X" dollars less, and had it not been in a wreck he could have gotten the regular price for it. Mr. Grigg has been in the automobile business for over 30 years, and it is a question of materiality.

The Court: What is the materiality of the repair bill?

Mr. Robertson: Well, he had to repair it in order to sell it.

The Court: No, he didn't have to repair it in order to sell it. The law in my opinion is very clear, that when something can be repaired you are required to take the repair bill or the depreciation in the value.

Mr. Robertson: Well, yes, your Honor, but the depreciation in value if you did repair it would be the cost of the repair plus the depreciated value of a car that has been in a wreck. I think your Honor can take judicial notice that a buyer [44] will pay less for a car that has been in a wreck.

The Court: I am not going to allow you to put the evidence in at the present time. You are going to have to show me some law that you are entitled to it.

Mr. Robertson: Does your Honor want to reserve the ruling?

The Court: No, I am not going to reserve the

(Testimony of Glen Earl Grigg.)

ruling. I say I am not going to allow it unless you show me some law that you are entitled to it.

Mr. Robertson: I will show you a bill of the Cadillac Motor Division of Los Angeles under date of December 9, 1954, for a Coupe de Ville automobile. Looking at that would you tell us, please, what you paid for the car?

A. I paid \$5,360.08.

Mr. Wulff: I object to that because that includes sales tax and includes license.

A. That includes sales tax and license.

The Court: I am going to sustain the objection to that. Even on your theory, what he paid for it doesn't make any difference. The question is how much was the car worth at that time.

Q. (By Mr. Robertson): Mr. Grigg, how much was the 1955 Coupe de Ville Cadillac worth that you bought at that time?

A. That is the list price on the automobile.

The Court: No, Mr. Grigg, the only question is what was that automobile worth, what was the reasonable market value [45] of that automobile at that time. If you know you may answer. If you don't know——

A. You mean for resale?

The Court: No, the reasonable market value.

A. You want the sales tax and license fee taken out?

Q. (By Mr. Robertson): No, the Judge asked you, Mr. Grigg, how much was this new 1955 Cadillac worth in December 9, 1954, the reasonable

(Testimony of Glen Earl Grigg.)

market value, what you would have to pay for the car at that time new?

A. Just exactly what I paid for it is the list price of the automobile.

Q. That is \$5,360.08?

Mr. Wulff: Same objection, your Honor.

A. \$5,360.08.

The Court: Wait a minute. The objection is sustained and the answer is stricken. That question can be answered and that is all there is to it.

Q. (By Mr. Robertson): Mr. Grigg, on December 9, 1954, the day you bought this new Cadillac Coupe de Ville brand new, what would you have to pay for that car to buy it?

The Court: No, that is not the question. The question is what was the reasonable market value of that car on that day?

A. May I answer that this way, your Honor? At that time this particular model was so scarce you could have gotten the price [46] for it.

The Court: Mr. Grigg, it is a very simple question. What was the reasonable market value of that automobile in December when you bought it?

A. The reasonable market value I think would be what you would have to pay for it.

The Court: Mr. Grigg, can't you answer that question?

A. I misunderstand you some way. You are talking about—do I want to take the sales tax and license off or do you add those in?

(Testimony of Glen Earl Grigg.)

The Court: I want the reasonable market value of that automobile on that day.

A. \$5,360.08 is the reasonable price for it, what it sold for.

Q. (By Mr. Robertson): Mr. Grigg, after the car was repaired it was sold?

A. That is right.

Q. And how much did you sell the car for?

A. \$4,850.00.

Mr. Robertson: That is all we have from the Plaintiff at this time, your Honor.

The Court: When did you sell that car?

A. I sold it in about three weeks, I think it was, after it was repaired.

The Court: I think you said it took about three months to repair it? [47]

A. That is right, a little over three months.

Q. It would be about four months after the accident?

A. Roughly four months.

Q. What was the reasonable market value of that automobile four months after the accident, which would be about April 9, 1955?

A. Well, if that car had not been wrecked I could have gotten——

Q. Well now——

A. We will say that I sold it at a reasonable price, then. That is as far as I can tell you.

Q. In other words, you think you got the reasonable market value of the car at that particular time?

(Testimony of Glen Earl Grigg.)

A. In the existing condition of the car, yes.

Q. What would be the reasonable market value of any Cadillac that was six months old?

A. I would say five thousand.

The Court: In other words, all this talk about \$150.00, is that it?

Mr. Robertson: That is all, your Honor.

Mr. Wulff: If your Honor please, with the Court's permission may Mr. Jack Diepenbrock cross-examine the witness. He took his deposition.

The Court: You are associated——

Mr. Wulff: That is correct. [48]

The Court: You don't have to have my permission as to how you want to operate.

Mr. Diepenbrock: Your Honor, I think it might speed up things if we took the lunch hour now. I was in another case that just finished last night at 8:00 o'clock, the jury just came in at 8:00 o'clock.

The Court: What is this, one of those double plays here from Evers to Tinker to Chance?

Mr. Diepenbrock: I will go ahead if your Honor wishes, but I think we can go faster——

The Court: I will take my chances on your spending 15 minutes now, because I can't start until 1:45 today. You certainly have got some questions you can ask.

Mr. Diepenbrock: All right.

The Court: Time is too precious in this Court to lose even 15 minutes.

Mr. Diepenbrock: Certainly.

(Testimony of Glen Earl Grigg.)

Cross-Examination

By Mr. Diepenbrock:

Q. Mr. Grigg, when you first saw these mules they were stationary on the highway, I think your testimony was? A. I beg your pardon?

Q. Referring to Plaintiff's Exhibit No. 1 when you first saw the mules they were out there on the shoulder and on the highway, is that correct? [49]

A. One was practically in the center and this one on the left side, I struck that with my left fender. In the position of this curve I can't place those mules as good as they were down here at a different angle.

Q. And those mules stayed right there where you have marked them here from the time that you saw them until the time that you hit them?

A. As far as I could say to that, with all the excitement of trying to stop, I couldn't say whether they moved a little bit or not.

Q. I see. But if they did it wasn't very much. As you were driving along there you said that you passed a pick-up truck, I think?

A. I said I went by him. He was in one lane and I was in the other. That is not passing.

Q. I see. In any event you started out behind him and you were going past him, as you say. How far past him had you gotten?

A. Not far enough for me to see him in my rear

(Testimony of Glen Earl Grigg.)

view mirror. I couldn't say, because I wasn't looking back, but I would say a very short distance.

Q. And of course I think we all know that when we are on an ordinary two lane highway and you pass a car we get back over to our own lane before we can see the car we pass in the rear view mirror. That is correct, isn't it?

A. That is right. [50]

Q. And there was another car, I think you said, behind you, a Buick?

A. Came up after the accident and rolled right into the edge of my car. Just broke his head lamp and that is all.

Q. Were you aware of him being behind you at the time that you saw the mules?

A. I knew there were some cars behind me, but there was quite a little space between us.

Q. Now you mentioned, I think, in your direct examination that—by the way there is a circle on here. Did you draw this circle on here or did Mr. Robertson put that on?

Mr. Robertson: No, I did.

A. Mr. Robertson put that on.

Q. (By Mr. Diepenbrock): What is that supposed to be? Does that call something to your mind?

A. Yes. This is an aerial photograph. I am going this way.

Q. Now wait a minute. Here is Sacramento here. Here is the tower bridge. You mean that this highway should be over here (indicating)?

(Testimony of Glen Earl Grigg.)

A. No. It don't show the curve there as straight as it should, but an aerial photograph always reverses it. You notice there is a line there, when you come into town you come in on—this would be my left lane, wouldn't it? Is that correct?

Q. Isn't this the highway you were on? I don't quite understand [51] what they have done here.

A. This is the divided highway here (indicating).

Mr. Robertson: At the end of the recess I told counsel and he said he had no objection I would draw a circle around the general area where the corrals were and draw a circle around the general area of the highway where the accident happened.

Mr. Diepenbrock: Well, the point is Mr. Grigg seems to think that he was over on this other highway.

A. No, no, I am trying to get this thing straight as you come into town. This would be your left lane here, wouldn't it?

Mr. Diepenbrock: I think you better find out if he understands the picture.

Mr. Robertson: This is going east towards town (indicating).

A. Right.

Mr. Robertson: This is the El Rancho.

A. But there is two—this is the lower—this is the westbound, right (indicating)?

Mr. Robertson: Yes.

A. And this is the eastbound (indicating)?

(Testimony of Glen Earl Grigg.)

Mr. Diepenbrock: And you were on the east-bound?

A. Yes.

Q. And that eastbound is the two lanes of travel that has the circle drawn around it?

A. That is right. [52]

Q. Now this curve that you spoke about, will you point that out on this picture here?

A. I would much rather if you would let me have the other photograph for one moment, I think I can show you the difference on the aerial photograph and the one that isn't.

A. Here is the Plaintiff's Exhibit No. 1.

Q. Here is Plaintiff's Exhibit No. 1.

A. All right. That is enough. This is the way we are going into town right here (indicating).

The Court: What are you accomplishing with all this?

A. You see the difference here in the angle on an aerial map?

Mr. Diepenbrock: I am not just wasting time, your Honor.

The Court: I know, but the point I am getting at is this is the very thing that I was critical of to begin with. If we had a map here we wouldn't have to be worrying about whether an aerial photograph shows a thing incorrectly. I think Mr. Grigg is entirely right, the average layman can't look at an aerial photograph and tell things, because of necessity it has to be taken at an angle.

A. That is right.

(Testimony of Glen Earl Grigg.)

The Court: You can't fly over an entire area with just one single move.

Mr. Diepenbrock: I think Mr. Grigg has said he can express himself with this ordinary photograph. [53]

A. That is right. This is the angle, I would figure that that is about a 45 degree angle, and this was over it, might come over a little farther in here, a Cadillac is a rather long automobile (indicating). That is not the true position of the car; you couldn't put in that way.

Q. (By Mr. Diepenbrock): That is correct. Can you tell me what the distance is that is embraced in this photograph, Plaintiff's Exhibit No. 1, from where you have the horses marked "G-1" and "G-2" and the forepart of the picture, how many feet of highway is that?

A. I believe that is on record over there, you have it. It is on record over there. The distance of each one of those pictures is on your record there.

Q. Which record is that? Is that on this legend?

Mr. Robertson: Yes.

Mr. Diepenbrock: May I refer to it?

Mr. Robertson: Certainly.

Mr. Diepenbrock: Well, this just tells where the camera was, Mr. Grigg, that doesn't answer my question. Well, it tells me where the camera is, it is on the east end of the bridge out there, but I don't know what the distance is from that bridge to where you hit the mules.

(Testimony of Glen Earl Grigg.)

Mr. Robertson: If you don't know, Mr. Grigg, say so.

A. I don't, I couldn't tell you by looking at this photograph just how far they were taken back here. [54]

Mr. Robertson: You see, counsel, those pictures only demonstrate the roadway and the ditch there.

Mr. Diepenbrock: Yes. Very well.

Mr. Roberston: They don't particularly demonstrate as they would if they were taken from the front side of the automobile or anything of that nature.

Q. (By Mr. Diepenbrock): There isn't much of a curve out there anyway, is there, Mr. Grigg?

A. I beg your pardon?

Q. I say there isn't much of a curve in that highway before you come up to the point of impact, is there?

A. There is quite a little curve in there and the lower part between the two highways, you can't see over that, where the mules came from, you can't see that.

Q. You can't see down in the depression?

A. Not at night, no.

Q. You can see a part of the embankment, can you not?

A. I beg your pardon?

Q. Can you see a part of the embankment?

A. I am sorry.

(Question read by reporter.)

A. Yes, coming up over the embankment.

(Testimony of Glen Earl Grigg.)

Q. (By Mr. Diepenbrock): Now that picture there, Plaintiff's Exhibit No. 1, that shows how everything was after the accident, is that correct, or before the accident, or at the moment of [55] the accident?

A. Well, at the moment of the accident, that is approximately the position I was in when I stopped.

Q. I see. And your car was tilted off at about a 45 degree angle, I think you said?

A. That is right.

Q. And how did it get in that angle, Mr. Grigg?

A. Well, when the second mule came in through the windshield I had no way of controlling it.

Q. I see. Now, Mr. Grigg, I don't think you told us your age.

Mr. Robertson: He can't hear you.

Q. (By Mr. Diepenbrock): Your age, Mr. Grigg. A. My age?

Q. Yes. A. 64 years old.

Q. 64. And you are presently suffering from certain illnesses at the moment, are you not?

A. I am what?

Q. You are sick now, are you not, Mr. Grigg? Aren't you having some trouble with your bladder?

A. No, I am not having any trouble with my bladder.

Q. Your bladder condition has been taken care of?

A. I had a small growth on the neck of my bladder which was taken off when I had my stomach taken out. [56]

(Testimony of Glen Earl Grigg.)

Q. I see. There has been no further treatment done there?

A. I have been back for one examination since.

Q. Your stomach condition was of long standing, was it not, the ulcers?

A. Yes, I had them several years.

Q. When did they start to bother you?

A. Oh, I would say about '46 or '7.

Q. And that progressed until it was necessary to have this operation in January of '54?

A. Yes, from my own idea; I just got tired of being worried with them, and I called my doctor and told him to get ready, I was coming up to have him take them out.

Q. You say you have no trouble with your back at the present time?

A. No, not bad, about the only time it bothers me, if I walk too much it gets tired, in the position I have to walk with a cane.

Q. The chiropractic treatment that you got in Ventura, was that directed to your hip or your back, or where?

A. My back had stiffened up. It didn't bother my hip at all, my back stiffened up from the jolt that I took.

Q. You had had trouble with your back prior to the accident in '54?

A. Not in a number of years.

Q. Pardon me? [57]

A. Not in a number of years.

Q. Not in a number of years. You had had

(Testimony of Glen Earl Grigg.)

trouble with your hip prior to the accident, had you not?

A. I had had a little slight touch of arthritis in it, but it had cleared up.

Q. It had cleared up?

A. It had cleared up, it didn't bother me.

Q. And when was the first time that you noticed trouble with your hip?

A. I don't know, '51 or '2.

Q. And you saw Dr. Henning about that condition, did you not? A. I did.

Q. And Dr. Henning had some X-ray pictures taken of your hip, did he not?

A. He had pictures taken the first time he examined me.

Q. And he told you that you had arthritis in your hip, did he not?

A. He told me I had a slight case of arthritis, yes.

Q. And he told you to curtail your activities somewhat, did he not? A. No.

Q. He did not?

A. Not at that time. It wasn't bad enough.

Q. Did he tell you to curtail your activities at any time prior to the accident? [58]

A. Yes, he told me to take it easy for a while after my operation and losing my wife.

Q. He, at no time prior to the operation told you to limit your activities, your stomach operation?

A. Well, that I can't answer, not that I re-

(Testimony of Glen Earl Grigg.)

member. He told me that anybody my age should take it easy. He told me that.

Q. This horseback riding that you have done—what do you call that trip?

A. Oh, I raised horses and have ridden horses, I have been on trail rides.

Q. Yes, that trail ride, that is an annual affair, isn't it? A. Yes.

Q. When was the last time prior to the accident that you took that?

A. I haven't taken a trail ride since I left Marysville, and I think I left there in '50.

Q. '50 is the last time you took it?

A. Yes.

Q. Isn't it a fact that Dr. Henning told you not to take that trip on one year because of your arthritis? A. I don't remember, I don't think so.

Q. You don't remember?

A. I don't think so.

Q. Now, with reference to your—well, let me ask you this: When is the last time that you played 18 holes of golf prior [59] to the accident?

A. In October.

Q. In October. When was the last time prior to that?

A. I played several times during October and I played in September.

Q. Let me ask you this, about your teeth, I am a little uncertain; you say the teeth that were taken out you had had for several years?

A. I had two partials that I had had for several

(Testimony of Glen Earl Grigg.)

years, and then after this, the upper teeth that held the partial in were loose and I had to have them pulled out, and I didn't have enough remaining teeth to bridge it over.

Q. I see. So that there were two of your natural teeth that were removed, and the rest were false?

A. Pardon me?

Q. There were two of your natural teeth which were removed?

A. Two of them which were removed—yes, there were three that were loose, one of them I had had pulled out and one put in in this partial right after the accident, and the others, they loosened up gradually until I had them all pulled out.

The Court: We will take the noon recess at this time. Take the recess until the hour of 1:45, a quarter to two, at which time we will resume the trial of the case.

(Recess taken to 1:45 p.m. this date.) [60]

Tuesday, March 6, 1956—1:45 P.M.

GLEN EARL GRIGG

resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Diepenbrock:

Q. Mr. Grigg, where had you been in San Francisco just prior to leaving?

A. I beg pardon?

(Testimony of Glen Earl Grigg.)

Q. What part of San Francisco did you leave from?

A. I think about the last place I was was 450 Sutter.

Q. 450 Sutter. You had been to the doctor that day?

A. I had been there to see him. I have lunch with him once in a while.

Q. I see. Had you been there as a social matter, or to get medical attention?

A. No, just social.

Q. Just social. Do you wear glasses, Mr. Grigg?

A. Pardon me?

Q. Do you wear blasses, eye glasses?

A. To read by is all.

Q. To read by. You don't wear them to drive?

A. No.

Q. And they are not required in your driver's license? A. No, sir.

Q. I see. And you told us that you were in Europe after [61] the accident. How long were you over there?

A. I guess about—I don't remember the date I sailed—or I flew over, but it was in May or June, and I came back—I left there the 26th of August.

Q. Did you travel around Europe extensively?

A. Yes, quite a bit.

Q. How did you get around?

A. I drove.

Q. You drove an automobile? A. Yes.

Q. And did you do a lot of walking over there?

(Testimony of Glen Earl Grigg.)

A. No, very little.

Q. Did you have any accidents over there?

A. No, sir.

Q. Were you able to drive your automobile comfortably?

A. That particular car I drove because I could keep my legs straight, I sat right down on the bottom and I kept my legs stretched out.

Q. What kind of an automobile was that?

A. Jaguar.

Q. That was yours? A. Pardon me?

Q. You bought that? A. I did.

Q. Now going back into your past history, you had trouble with [62] your neck in 1945, didn't you? Do you remember that?

A. I had what?

Q. Neck trouble in 1945.

A. I don't remember.

Q. Didn't you have your neck X-rayed for arthritis at that time?

A. That I couldn't tell you. I don't remember those dates.

Q. And you had arthritic trouble in your shoulder in 1947, did you not?

A. Yes, I had a little bit of trouble with the shoulder, not to amount to anything.

Q. You went to Dr. Henning about your shoulder in '47, didn't you?

A. Well, I go to see Dr. Henning regularly for a check-up.

(Testimony of Glen Earl Grigg.)

Q. And you were also going pretty regularly to the clinic down in Santa Maria, were you not, about various aches and pains?

A. I am sorry, I didn't hear you.

Q. I say weren't you also going to the clinic in Santa Maria to Dr. Randall down there, about your arthritis prior to this accident?

A. No, not for arthritis.

Q. What were you seeing him for down there?

A. Not that I can remember of. I went there with my stomach before my operation.

Q. You didn't go there for anything other than your stomach? [63]

A. Not that I can recall.

Q. After the accident you returned to Santa Maria?

A. I was in and out of there, yes.

Q. And you took your car down there to be fixed?

A. I didn't take it down, I had it taken down.

Q. I see. How did you get there?

A. I drove another car down.

Q. You bought another car? A. Yes.

Q. What kind was that?

A. I bought a Cadillac.

Q. And were you able to drive it all right?

A. Yes. You don't use your left leg in driving that type of car.

Q. One thing, Mr. Grigg, I think that on this list of doctor bills there is an osteopath, is that correct?

(Testimony of Glen Earl Grigg.)

A. I don't know whether there is an osteopath or a chiropractor. There were two I went to on my way south in Ventura.

Q. There were just the two of them there in Ventura, once going and once coming, is that correct? A. That is right.

Q. And are you presently occupied with anything at all, Mr. Grigg? Are you doing anything at all right now? A. No.

Q. I see. When did you get the second Cadillac, Mr. Grigg? [64] A. When did I get it?

Q. Yes.

A. I bought it the following day after I was hurt.

Mr. Diepenbrock: I see. I have no further questions. Thank you.

Mr. Robertson: That is all, your Honor.

Mr. and Mrs. Spansel are supposed to be here. May I go out in the hall a moment?

The Marshal: What is the name?

Mr. Robertson: Spansel, Mr. and Mrs. Spansel.

The Marshal: No answer, your Honor.

Mr. Robertson: Is Mr. Anthony Perine in the courtroom? Will you step forward, sir?

ANTHONY PERINE

called as a witness on behalf of Plaintiff, sworn:

Direct Examination

By Mr. Robertson:

Q. Mr. Perine, where do you reside, sir?

A. 211 Alameda Street, West Sacramento.

Q. And what is your business or occupation?

A. Industrial Clerk for the Southern Pacific Company.

Q. How long have you been so employed?

A. Since 1942.

Q. And what were your duties or your position with the Southern Pacific Company on December 17, 1954, the day of the [65] accident?

A. Industrial Clerk.

Q. And what do those duties consist of as Industrial Clerk?

A. Tag and seal cars, inspect loads.

Q. Tag steel cars? A. Seal.

Q. Oh. And, Mr. Perine, did your duties in December, 1954, also include overseeing the Southern Pacific stockyards in West Sacramento?

A. Yes, sir.

Q. And what were your duties in that regard?

A. Well, we would feed—unload and load cars and feed if they stopped for rest.

Q. And in unloading cars what were your duties there? To see that the animals were put in the corral? A. Yes, sir.

Q. And then when the animals were in the

(Testimony of Anthony Perine.)

corral until they were shipped out what would your duties be in regard to those animals?

A. Well, if they stopped for rest they would be fed and watered and counted and then loaded when their time was up, back in the cars, the same procedure.

Q. And how long have you been engaged in having these duties with the Southern Pacific Company?

A. Since '42 outside of the Army tour. [66]

Q. You have been handling livestock as well as your other duties ever since you have been in the Southern Pacific Company? A. Yes.

Q. Now, are you on call whenever shipments happen to come in to go out there?

A. Yes, sir.

Q. And shipments come in at various hours of the day and night, I presume? A. Yes, sir.

Q. Was your attention directed to the shipment of two cars of horses and mules that arrived here in Sacramento some time prior to the happening of this accident? A. No, sir.

Q. Were you called upon on or about December 16, 1954, to go to West Sacramento Southern Pacific stockyards to unload two cars of horses and mules?

A. That particular shipment somebody slipped up and I wasn't called.

Q. Well, what do you mean you weren't called, Mr. Perine?

Mr. Wulff: Counsel, I think you are referring to a shipment that came in on the 17th; I think you

(Testimony of Anthony Perine.)

are assuming something not in evidence, it came in on the 16th, as you know.

Mr. Robertson: I am saying the 16th. [67]

Mr. Wulff: I thought you said the 17th. I beg your pardon.

Q. (By Mr. Robertson): Mr. Perine, what do you mean by "somebody slipped up" in notifying you?

A. Well, I happened to be over at my mother's at the time and I just seen them go by going over to the corral, so I went over there.

Q. What time was this?

A. That is when they came in, the 16th.

Q. December 16, 1954? A. Yes, sir.

Q. What time did they arrive?

A. I got there, I would say about 10:00 o'clock, approximately.

Q. In the morning or night?

A. Morning.

Q. So you went over there, is that correct?

A. Yes, sir.

Q. And what did you do with regard to this shipment of horses and mules?

A. Well, Coon unloaded them and I counted them and he put them in—he closed the gate and I left.

Q. Can you tell us approximately how many horses and mules were put in the corral?

A. Well, they usually run between 25 and 30. I don't remember the exact count. [68]

Q. Now, Mr. Perine, is it correct procedure

(Testimony of Anthony Perine.)

when a shipment comes in for you to go over and help them unload them and put them in a corral, or do you have an assistant?

A. I have an assistant.

Mr. Wulff: Just a moment. I object to that as too broad. It doesn't specify whether they come in for rest or are arriving at their destination. It depends upon what they come in for as to what he has to do.

The Court: The objection will be sustained.

Q. (By Mr. Robertson): Did any other Southern Pacific Company employee assist you in unloading these animals on December 16, 1954?

A. No, sir.

Mr. Wulff: Just a moment. I object to that question, that assumes something not in evidence. Mr. Coons unloaded them. Mr. Coons is the shipper, as you know, or the consignee.

Mr. Robertson: Mr. Coons is not the shipper, counsel.

Mr. Wulff: He is the consignee.

The Court: Well, it doesn't make any difference who he is. The previous testimony of this witness was that Mr. Coons unloaded them and put them in the pen and he simply counted them.

Q. (By Mr. Robertson): Was there any other Southern Pacific employee at the corral at the time the animals were unloaded?

A. No, sir. [69]

Q. Now, when the animals came in on the cars on December 16, 1954, at 10:00 o'clock a.m., were the doors locked or sealed?

(Testimony of Anthony Perine.)

A. Well, what do you mean by locked, sir? Do you mean a latch on them?

Q. Yes. A. Yes.

Q. And who removed that latch on that day?

A. Mr. Coons.

Q. Were you there when he did it?

A. Yes, sir; on one car; yes, sir.

Q. Now, then, Mr. Perine, after the animals were placed in the corral on December 16th, did you make any report to the Southern Pacific Company that they were there? A. Yes, sir.

Q. And to whom did you make that report?

A. I just called 12th Street that the horses were unloaded.

Q. 12th Street? A. Yes, sir.

Q. And what is that 12th Street?

A. Well, there is a clerk there that you notify all calls.

Q. Who did you notify?

A. I don't remember, but it was the chief clerk there.

Q. And did you make any written report concerning the fact that these mules were in the corral?

A. Yes, sir. [70]

Q. To whom did you make the written report?

A. We have a stock book that I write in.

Q. You wrote in a stock book?

A. Yes, sir.

Q. In whose possession and control is the stock book?

Mr. Wulff: I have it, counsel.

(Testimony of Anthony Perine.)

Q. (By Mr. Robertson): Is this a book that you keep in your possession or a book that you fill out daily and turn into the company?

A. It is a book that is set inside of a little door.

Mr. Robertson: Counsel, the book handed me has the date August 16th, 12:20 A.

Mr. Wulff: I beg your pardon, that is the wrong page, counsel.

Q. (By Mr. Robertson): You say this stock book is kept out at the corral?

A. No, sir, it is kept in the office at Front and J Streets.

Q. So after you phoned into the company on the 16th that they arrived, then you went down and filled out the stock book, is that correct?

A. I tell them when they are unloaded.

Q. Now, counsel has handed me here, it says, "Stock Book," and on the front it says, "R. Duke." Who is R. Duke?

A. He works with me.

Q. An S.P. employee? [71] A. Yes, sir.

Mr. Wulff: You are looking at the reloading page, counsel.

Mr. Robertson: I am 12-16-54.

Mr. Wulff: One page is loading and the other is reloading.

Q. (By Mr. Robertson): Yes. In this stock book which is dated 12-16-54, 10:00 A., is that correct? A. Yes.

Q. That means December 16, 1954, 10:00 a.m.?

A. Yes.

Q. And it says, "Shipper, Coons."

(Testimony of Anthony Perine.)

A. Yes.

Q. It is all in pencil handwriting. Is that your handwriting? A. Yes.

Q. Then it says, "AT 29117, Chute 29."

Mr. Wulff: May the record show, if your Honor please, he is referring to the left-hand page.

Mr. Robertson: Yes.

Mr. Wulff: Because the other page is not in a handwriting.

Mr. Robertson: That is right.

Q. What does that I just read to you mean?

A. Number of head.

Q. And what does, "AT 29117" mean?

A. Car number.

Q. And under that is "AT 27608, Chute No. 28"?

A. That is the head number, 28 head. [72]

Q. So that there came in that shipment then 47 head? A. Yes, sir.

Mr. Wulff: It is 57. A. 57, yes.

Q. (By Mr. Robertson): I am sorry. 57. And under that it says, "Unloaded by owner, counted by me, not called by 12th Street, happened to see stock pass," and your name? A. Yes, sir.

Q. Then you weren't notified in advance of this shipment? A. No, sir.

Q. Now, what does the chute number mean? Is that where the car is started to load them into the corral? A. Where is the chute number?

Q. Up above here, it says, "Chute number."

A. Well, we never did put down the chute number. We have just got two chutes, that is all.

(Testimony of Anthony Perine.)

Q. And was this entry that I have just read that you have just testified to, on the left-hand side of the page, made by you on the date written, 12-16-54?

A. Yes, sir.

Q. Now, Mr. Perine, on December 16, 1954, after they were loaded, what did you do then in regard to these horses and mules, if anything?

A. Afterwards?

Q. Yes. [73]

A. Nothing; he took complete charge of them.

Mr. Robertson: Move to strike as not responsive.

The Court: The motion is denied.

Mr. Robertson: May it please the Court, the question was: "What did you do in regard to these?" and he said, "Nothing; he had complete charge."

The Court: No, that is not what he said. He said, "Nothing; he took complete charge of them." So I think it is responsive to your question, "What did you do about them?"

Mr. Robertson: I think that is his opinion and conclusion, your Honor.

Q. All right, Mr. Perine, did you stay at the corral—when did you leave the corral after the horses were unloaded?

A. Oh, I stayed there about 10 or 15 minutes, counted them inside. They were in the corrals and the gate secured.

Q. Who was there at that time with the horses?

A. Mr. Coons.

(Testimony of Anthony Perine.)

Q. Anyone else?

A. Well, there were some people I didn't know.

Q. Any S.P. employees?

A. Not that I noticed.

Q. All right. Now, did you come back to the corral at all that day? A. Not that I recall.

Q. You weren't back there at all that day? [74]

A. No, sir.

Q. Do you know of your own knowledge, therefore, or did you observe—strike that.

Did you observe any other persons at the corral the rest of the day then?

A. Let's see; well, not that I know.

Q. Now, Mr. Perine, did you visit the corrals at any time after you first checked the horses and mules in until the time of the accident?

A. Yes, sir.

Q. When did you next go out to the corrals where the horses and mules were still there in the corrals? A. Next morning.

Q. What time did you arrive there?

A. I was there about 10:00 o'clock.

Q. Tell us what you observed when you arrived there.

A. Well, Mr. Coons had the horses outside of the corrals and they were eating on some bean straw along the outside of the corrals.

Q. And would that be outside of the corral area?

A. It is in the same area but it is outside the gate.

Q. Was there any enclosure like a fence?

(Testimony of Anthony Perine.)

A. Well, there was a ricochet of a fence on one end on the outside.

Q. Mr. Perine, I am going to show you a picture bearing the [75] photographer's identification number 11346-9 and ask you if that picture fairly represents the area.

Mr. Wulff: If your Honor please, in the interests of time I am perfectly happy to stipulate that——

A. Yes, it is.

Mr. Wulff: ——that these pictures show the conditions existing at the time they were taken, that is, on September 27, 1955. Now, there is a growth of weeds there that grew the preceding growing season. I can't stipulate that those weeds were there, because they grew during the period since December 16, 1954.

The Court: Was there any material change in the fence as far as you can now see?

Mr. Wulff: Well, I can't answer that because the fence is constantly being repaired. I can tell you the number of times it has been repaired since.

Mr. Robertson: Yes, there is, your Honor. I am only going to use a couple of these pictures. I am not going into the question of the corral at this time. Perhaps we can speed it up, the witness might be able to——

Q. Does this picture showing the area adjacent to the corral fairly depict what the area looked like on the day of the accident?

A. Yes, sir.

Mr. Robertson: I would like to have this picture,

(Testimony of Anthony Perine.)

photographer's number 11346-9 admitted as Plaintiff's Exhibit next in order, your Honor.

The Court: I am going to mark it Plaintiff's Exhibit No. 9 for identification. I am not sure I see the materiality of it at this time. Plaintiff's 9 for identification.

(The photograph referred to was marked Plaintiff's Exhibit No. 9 for identification.)

Q. (By Mr. Robertson): I will show you another picture, 11346-10, and ask you if that picture fairly depicts the condition that existed at the front gate of the corral on the day of the accident?

A. That is a side gate. The front gate is over here.

Q. Well, the side gate, then.

A. I don't think that is the same gate.

Q. You think that is a new gate?

A. Yes, sir.

Q. Other than a new gate put on, does the picture fairly show the layout of the ground and the physical structure of the corral on the day of the accident?

A. Yes, sir.

Q. It does. I will ask that this be admitted——

Mr. Wulff: Same objection, your Honor.

The Court: For identification only. Plaintiff's Exhibit 10 for identification.

(The photograph referred to was marked Plaintiff's Exhibit No. 10 for [77] identification.)

(Testimony of Anthony Perine.)

Q. (By Mr. Robertson): Now, Mr. Perine, Plaintiff's Exhibit 9, when you arrived on the morning of December 17, 1954, does this picture show the general area where the horses and mules were being fed or grazed?

A. Well, the general area, yes.

Q. Were they being grazed or fed in the general area depicted in Plaintiff's Exhibit No. 9 for identification, the picture I am showing you?

A. Yes, sir.

Q. And outside of the corral?

A. Yes, sir, that is the general area.

Mr. Robertson: I will move to admit this now, your Honor, in evidence.

The Court: The motion is denied.

Q. (By Mr. Robertson): I will show you Plaintiff's Exhibit 10 for identification and ask you if that is an extension of the area alongside the corrals of the other photograph, where the animals were also grazing on the day of the accident?

A. I don't quite get the question.

Q. Plaintiff's Exhibit 9 for identification shows the general area, which would be the westerly area from the side gate, and then the hay pile appears to the right of Plaintiff's 9.

Now, Plaintiff's 10——

A. That is where they were, right in this location (indicating).

Q. Yes. So that if you put Plaintiff's 10, the photograph, [78] in your right hand, to the right of

(Testimony of Anthony Perine.)

Plaintiff's 9, it shows the general area, is that correct? A. Yes.

Q. Were the animals grazing all through that area? A. Some, yes.

Q. And is there a road immediately south of this area depicted in these two pictures?

A. Yes, sir.

Q. And is that a public road? A. Yes, sir.

Q. And are there other roads leading off at right angles from this road to the main highway?

A. Well, it doesn't go to the main highway, but there is a road there that goes west.

Q. And is there a spur track of some sort that leads from the general area of the stockyards down to the highway? A. Yes, sir.

Q. And crosses the highway by an overpass?

A. Yes, sir.

Q. How many horses and mules did you see being grazed outside the corral on December 17th in the morning when you came there?

A. I didn't count them.

Q. Can you give us an estimate? Were there any in the corral?

A. I don't think there was any in the corrals.

Q. So that your best memory now is that all of them were outside? [79]

A. Well, I seen a few of them all the way down. I didn't check the corrals, but I seen them outside. I don't know how many were outside. I didn't check to see if there was any inside.

(Testimony of Anthony Perine.)

Q. Approximately how much of an area were they spread out in?

A. I would say two or three hundred feet.

Q. Did you observe anybody who appeared to be guarding them or attending them?

A. Yes, sir.

Q. And how many people did you observe?

A. One.

Q. And who was that? A. Mr. Coons.

Q. And did you speak to Mr. Coons at that time?

A. Just maybe said hello and that is all.

Q. And how long did you remain there?

A. Just a few minutes.

Q. Did you make any entries in a stock book or any kind of a book at that time? A. No, sir.

Q. And did you make any request of Mr. Coons to put the mules back in the corral?

A. No, sir.

Q. And when you left the corral where did you go?

A. I think I went over to my mother's, who lives in that area. [80]

Q. Were you on duty at the time you went down there on the morning of the accident?

A. No, sir.

Q. What were your duties——

Mr. Wulff: Are you referring to 10:00 o'clock, at the time he went there that morning?

Mr. Robertson: Yes.

Q. What were your duty hours on that day, December 16, 1954? A. Four to midnight.

(Testimony of Anthony Perine.)

Q. And you went over to your mother's. Now, at any time during the day of December 17, 1954, did you return to the stockyards? A. Yes, sir.

Q. When was that?

A. About 15 minutes to four.

Q. And were you on your way to work at that time? A. Yes, sir.

Q. And how long were you at the stockyards at that time? A. Not very long.

Q. And what did you observe at that time?

A. Mr. Coons was still there at that time.

Q. Did you observe any horses and mules at that time? A. Yes, sir.

Q. And where were they?

A. Still in the same general area.

Q. Were there any mules and horses in the corrals at this time? [81] A. I didn't check?

Q. And was there just Mr. Coons there watching them? A. That is all I observed, yes.

Q. And did you at that time have any conversation with Mr. Coons?

A. Not that I remember.

Q. You didn't instruct him to put them back in the yards? A. No, sir.

Q. Now, other than filling in this stock book we have discussed here a moment ago, did you fill in any other report for the S.P. Company regarding these mules and horses that were at the corral?

A. No, sir.

Q. And was it part of your general duties at the corrals to feed and water livestock in the event the

(Testimony of Anthony Perine.)

consignee did not feed them? A. Yes, sir.

Q. On December 14, 1954, did you have any special instructions from the Southern Pacific Company concerning when you would feed livestock that arrived and when you would not feed them?

Mr. Wulff: I object to that. You mean livestock that arrived at the point of destination or do you mean livestock that arrived there for rest and water? It is a different situation.

Mr. Robertson: I mean livestock that arrived at the corral [82] that he had a duty to look over.

Mr. Wulff: For any purpose?

Mr. Robertson: Yes.

Mr. Wulff Do you understand that, Witness?

A. Well, if it is consigned to Sacramento we just check to see the condition and the number in the unloading, and the consignee takes charge of the feeding and watering, we don't feed and water them.

Q. (By Mr. Robertson): And who gives the instructions, who gave you the instructions?

A. Those were instructions from the Southern Pacific Company.

Q. Are those instructions given to you orally or in writing? A. Well, orally.

Q. Do you recall who gave them to you and when they were given to you?

A. Well, Mr. Mills told me about it years ago.

Q. At any time when animals come into the stockyards, regardless of what purpose they come into the Southern Pacific stockyards, before they

(Testimony of Anthony Perine.)

can be fed by the owner-consignee, does special permission have to be requested by the owner-consignee to do that?

A. If he wants them fed, it has to request it.

Q. Request what? A. For them to be fed.

Q. But the point I am making is: If I were to bring into your [83] stockyards 50 horses and mules and wished to feed them myself, do I have to request special permission to do that or not?

A. Would they be consigned to Sacramento final destination?

Q. They would be brought into your stockyards—is there a distinction? A. Yes, there is.

Q. What is the distinction?

A. Well, when they are consigned to Sacramento we do not feed them.

Q. Supposing that no one were there to receive them, would you still not feed them?

A. Well, I would notify the office that I can't find the consignee.

Q. Supposing that no one was there to receive them, you would still not feed them?

A. Well, I would notify the office that I can't find the consignee.

Q. Supposing they are not consigned to Sacramento but are merely stopping here in transit, is there a different rule? A. Yes.

Q. What is that?

A. I call up Post Street and they tell me what amount to feed them and they are unloaded and put

(Testimony of Anthony Perine.)

in the corrals and fed and watered and have the rest period.

Q. By the Southern Pacific? [84]

A. Yes.

Q. If the owner desires to feed them while they are pulled off here in transit, does he have to request special permission to do so?

A. I don't remember any of them feeding here.

Q. Well, what are your instructions in that regard?

A. Well, I get my instructions—my instructions, I think, come off the bill of lading.

Q. You, a moment ago, said there was a distinction; if they are shipped directly to Sacramento and the shipment ends here, then the owner feeds them, is that correct?

A. He takes possession, yes, sir.

Q. But if they are stopped in transit here, in transshipment, then you feed them, is that correct?

A. Yes, I take possession.

Q. But if the owner desires to feed them, under that circumstance does he have to request permission to do so?

A. I couldn't answer that question.

Q. Do you know whether Mr. Coons requested permission to feed his own horses and mules in this matter, either on December 16th or December 17th?

A. He always fed his own stock.

Q. Pardon me?

A. He always fed his own stock.

Q. I am talking about this instance. [85]

(Testimony of Anthony Perine.)

Mr. Wulff: That answers the question.

A. He fed them, yes.

Q. (By Mr. Robertson): Pardon me?

A. He fed them.

Q. I didn't ask you that. I am asking did he make any request of your knowledge, either on December 16th or December 17th of you that he could feed his own animals himself?

A. I don't remember.

Mr. Robertson: Counsel, would you refer to Page 7 of this gentleman's deposition and stipulate that the questions were asked and answers given?

Mr. Wulff: That is correct.

Mr. Robertson: May I read the questions and answers to the witness?

Mr. Wulff: Yes.

Q. (By Mr. Robertson): You recall giving that deposition? A. Yes, sir.

Q. I will ask you if those questions were asked and these answers given, line 3, page 7:

"Q. Those animals were placed in the Washington corral? A. Yes, sir.

"Q. Were there any other animals in the corral at the time, other than those belonging to Mr. Coons? A. I don't know. [86]

"Q. Were any arrangements made with Mr. Coons for the feeding and watering of the livestock?

"A. Well, he watered and fed his own.

"Q. Did he make any request that he feed and water his own?

(Testimony of Anthony Perine.)

“A. He would have to, I guess, or they wouldn’t let him.

“Q. Is it true that these animals were being held in the Washington corral pending shipment to Santa Rosa? A. I don’t know.”

You gave those answers, is that correct?

A. Yes, sir.

Mr. Wulff: I think you misread that. It says “pending reshipment to Santa Rosa.” I think you left the word “re” out. You said, “pending shipment to Santa Rosa.” It is “pending reshipment.”

Mr. Robertson: Pending reshipment.

Q. Now, after you left the corral around a quarter to four on Friday, December 17, 1954, where did you go?

A. I went to work, Front and J Streets.

Q. 12th Street? A. Front and J Streets.

Q. What were your duties down there?

A. Industrial Clerk.

Q. Filling out papers and things? [87]

A. Tagging and sealing cars and so forth.

Q. Did you make any report orally or in writing at the time you went down to work about these horses that were in the corral being fed outside the corral? A. No, sir.

Q. Were you given any instructions on December 17, 1954, by any of your superiors concerning those horses and mules at the corral at that time?

A. Could I have that question again, please?

Q. Yes. When you arrived at work on December 16, 1954, after seeing those horses out there at a

(Testimony of Anthony Perine.)

quarter to four, when you arrived at work, did you receive any instructions concerning the horses and mules that were out there? A. No, sir.

Q. Now, Mr. Perine, what type of lock was on the side gate of the corral on December 17, 1954? Which side gate is depicted in Plaintiff's 10 for identification?

Mr. Wulff: What is the question?

Q. (By Mr. Robertson): What type of lock was on the side gate of the corral on December 16, 1954, which side gate is depicted here in Plaintiff's 10?

Mr. Wulff: What is the materiality of that? The horses weren't in the corral on December 16.

Mr. Robertson: This is preliminary, your Honor. There will be testimony—— [88]

A. I don't know. I never used that gate. I couldn't tell you that.

Q. Do you know whether it was chained or locked or whether there was a sliding bolt, or you don't know? A. I don't know.

Q. How often did you visit the corrals within the last several months prior to December 16, 1954?

A. Oh, I couldn't say.

Q. Have you any estimate? Once a week, once a day?

A. I have been by there in my tour of duties.

Q. Pardon me?

A. I have been by there in my tour of duties.

Q. Have you any estimate how often you went by?

(Testimony of Anthony Perine.)

A. I would say twice a week I go by the corrals.

Q. You don't have any recollection of how this gate was fastened? A. No, I don't.

Q. Can you tell us, please, on December 16, 1954, what the condition was inside of the corral, was it dry, was it muddy, or just what was the condition?

A. Muddy, some of it.

Q. Excuse me? A. Muddy.

Q. Have you any idea how deep the mud was in there?

Mr. Wulff: What day are you talking about?

Mr. Robertson: Inside the corral.

Mr. Wulff: I am asking you what time. After the rain, of course, it is muddy. What time are you talking about?

Mr. Robertson: I am talking about 10:00 a.m. and 4:00 p.m., the two times he visited that on December 16, 1954.

A. I would say it was pretty muddy.

Q. Pretty muddy. And would that be generally all over the corral? A. Yes, I would say.

Q. And do you have any idea how deep the mud was in there? A. Well, no, sir.

Q. Have you fed livestock quite a bit?

A. Not lately, sir.

Q. Well, prior to the accident had you fed livestock at the S.P. corral on numerous occasions?

A. Yes, when they are in transit.

Q. Would it be practical with the mud that was in the corral on December 17, 1954, to feed livestock in the corral? A. Yes, sir.

(Testimony of Anthony Perine.)

Q. The fact that that mud was in there would not affect the feeding of them in any way?

A. Well, they have bins to feed them in.

Q. And would the animals, the 57 animals in there be able to lay down after they ate in there without getting all muddy?

A. I guess not. [90]

The Court: What do you mean by bins? Are you talking about mangers?

The Witness: Well, I call them bins. They are made like a big box.

The Court: Well, how big are they?

The Witness: I guess they hold a couple or three bales of hay.

The Court: Well, are they square?

The Witness: Square.

The Court: Where are they?

The Witness: They are inside the corrals.

The Court: Where inside the corrals: out in the middle, next to the fence, or——

The Witness: Well, they are about right next to the fence. I guess you would say off a little ways.

The Court: How long are they?

The Witness: I don't know exactly. I would say about—oh, I would say about four by six.

The Court: How many of them?

The Witness: I think there might be about four or five of them there. I don't know for sure.

Q. (By Mr. Robertson): Mr. Perine, when you observed on December 17th the horses and mules out of the corral, isn't it a fact there was hay put

(Testimony of Anthony Perine.)

down for them to eat and some of them were actually eating hay outside?

A. They were munching along there, and there used to be a pile of bean straw that was there, and some was eating there [91] and some was stretched out, too.

Q. Did you see any hay laid down for them to eat, actual hay that had been brought there and laid down?

A. I didn't observe that.

Q. Now, was there any other S.P. employees on duty at the corral on the morning of December 16th when these animals arrived in these two cars?

A. Not that I know of.

Q. When you got there were the cars on the siding stopped and by themselves?

A. They were there stopped.

Q. Stopped. And were the doors on the cars locked and sealed?

A. Well, Coons had had one unloaded and when I arrived he was on the second car.

Q. How did he load them, on a chute, or take them down off the door and lead them around and put them in the corral, or how?

A. We have a carriage that comes up.

Q. A carriage?

A. Yes, a chute that pushes up to the car door and they walk.

Q. Aren't these doors locked in any way on the freight car when livestock are moved?

A. Not horses.

Q. Anybody can open the doors?

(Testimony of Anthony Perine.)

A. We do not seal horses or cattle. [92]

Q. And he had one car completely unloaded before you arrived? A. Yes, sir.

Q. And the other car, I assume the chute was put on its door and unloaded?

A. No. I was there when that took place.

Q. And has Mr. Coons shipped other shipments with you prior to this? A. Yes, sir.

Q. Many of them? A. Yes, sir.

Q. He used the yards there? A. Yes, sir.

The Court: Did he use the same chute to unload both cars?

The Witness: No, sir. There are two chutes.

The Court: In other words, the cars were spotted at the chutes?

The Witness: Yes, sir.

The Court: So you didn't have to bar the cars to get them from the door to the chutes?

The Witness: No, sir.

Q. (By Mr. Robertson): Now, after all the animals got in, did you go around the corral to see that all the gates were closed and shut?

A. The gates where the horses is, yes, sir.

Q. So that these horses and mules were in one portion of the [93] corral and the only way they could get out was through one gate, is that correct?

A. Well, they would have to go through the gate into the hallway, and then out.

Q. Yes. Did you see that both of those gates were closed and secured before you left?

(Testimony of Anthony Perine.)

A. No, he took care of everything. I just counted them.

Q. I believe you said previously, before you left the gates were closed. Do you recall whether they were closed or were not closed?

A. Well, the horses were in there, so they were closed.

Q. They were closed?

A. I assume they were, yes, sir.

Q. Well, do you know? Do you know whether they were or were not?

A. Well, I would say they were closed.

Q. All right. Now, at that time, December 16, 1954, you having been in charge of the corral with animals being put in there, was there a chain with a lock where you locked the gate, or was there not any lock there?

A. I don't remember. I don't think there was.

Q. You don't think there was any lock on them?

A. No, sir.

Q. In other words, there would be just a sliding board that is depicted in the picture that this slides over and locks? [94]

A. That is the outside gate.

Q. Yes. And this chain and lock that is on the picture there was not on that gate at the time of the accident?

A. I don't think it was, sir.

Q. Now, Mr. Perine, were you notified at any time on December 17, 1954, the day of the accident, that these animals had escaped or had gotten loose?

A. Yes, sir.

(Testimony of Anthony Perine.)

Q. And when were you notified?

A. I was notified approximately 8:00 o'clock, 8:30.

Q. By whom were you notified?

A. Mr. McKenzie.

Q. Who is Mr. McKenzie.

A. He is head waybiller.

Q. Head what? A. Waybiller.

Q. At 8:00 o'clock, you say?

A. Well, thereabouts; 8:00 or 8:30, I don't remember exactly.

Q. By Mr. McKenzie, head waybill clerk?

A. Yes, sir.

Q. And he is employed by the Southern Pacific?

A. Yes, sir.

Q. Did he give you any instructions at that time concerning the mules that were loose?

A. He told me to call the chief dispatcher's office. [95]

Q. What did he tell you to tell the chief dispatcher?

A. Well, he heard there were some horses running loose.

Q. Were you given any other instructions at that time?

A. Well, I called the chief dispatcher's office and whoever answered the phone there said there were horses down on the right-of-way.

Q. Down the right-of-way? A. Yes, sir.

Q. Did he state which right-of-way?

A. The S.P. right-of-way.

(Testimony of Anthony Perine.)

Q. Did he say whereabouts on the right-of-way?

A. Well, he didn't pinpoint that, no, sir.

Q. And is he an employee of the Southern Pacific? A. Yes, sir.

Q. And what is his name?

A. I don't know, sir.

Q. And did he give you any instructions what to do about these animals that were loose on the right-of-way?

A. No, he didn't say, he just said there were horses roaming on the right-of-way, that is all.

Q. As I understand it, Mr. McKenzie told you about it and told you to call the dispatcher, is that it? A. I think that is right.

Q. You notified the dispatcher that this happened, is that correct? [96]

A. I think the chief dispatcher called him for me.

Q. The chief dispatcher called him?

A. That is the phone that I work by, that extension.

Q. Did anybody working for the Southern Pacific instruct you to go out and assist in rounding up the mules? A. No, sir.

Q. Did you go out and assist to round up the mules? A. Yes, sir.

Q. You did. And when did you go out to assist to round up the mules?

A. Oh, I guess it was around about 9:00 o'clock, but we didn't find any.

(Testimony of Anthony Perine.)

Q. Did anybody go with you that worked for the Southern Pacific?

A. Well, Mr. Duke was already there some place and we finally met somewhere.

Q. You met Mr. Duke out there?

A. Yes, sir.

Q. And he is your assistant, is that correct?

A. Yes, sir.

Q. At that time he was employed by the Southern Pacific Company, is that correct?

A. Yes, sir.

Q. And you just went out there on your own, is that it, or did somebody tell you to go out there? [97]

A. I just took it for granted I was supposed to go.

Q. And you went out and searched for the mules, and did you ultimately find the mules?

A. I never saw them.

Q. You never saw them? A. No, sir.

Q. At any time while you were out did you go back over to the corral and did you see them back in the corral?

A. You mean after the 17th, in the evening?

Q. Yes, that evening at any time did you go over to find out if they had got them back?

A. Oh, yes.

Q. When did you go over to the corral?

A. I was over there about, I guess, around 9:00 o'clock. We drove around looking for them and then we went back Saturday morning.

(Testimony of Anthony Perine.)

Q. Now when you went back to look for them, you were in a car, is that correct?

A. We all was, yes, sir.

Q. Where did you go to look for them? Did you first go to the corral?

A. Well, I know we was driving around.

Q. Well did you go to the corral at any time while you were looking for them?

A. Yes, sir. [98]

Q. Did you stop at the corral and look around?

A. Yes.

Q. Did you observe any gates open at that time?

A. No, I don't recall.

Q. You don't recall whether you did or didn't?

A. No, sir.

Q. After you went to the corral and looked around, were there any horses or mules in the corral at that time?

A. Well, I didn't go in the corral that time, either.

Q. Well, you can stand on the road and see in the corrals, can't you?

A. Well, this was dark, this is evening.

Q. Well, do I understand you didn't bother to go out and look to see if there were any horses or not?

A. Well, I met Duke and he told me there were horses running around, so I went with him.

Q. So it is your testimony you didn't look in the corral at all to see if there were still some there?

A. I don't remember exactly if I looked or not.

(Testimony of Anthony Perine.)

I know I met Duke and then we proceeded together.

Q. And you met Duke at the corral?

A. Thereabouts, yes.

Q. And then you and Duke proceeded from there? A. Yes.

Q. Which route did you proceed on, if you remember? [99]

A. Well, we just went up and down the roads.

Q. Up and down roads. Were there a lot of roads around the corral that are open roads there, private roads? A. There is a few, yes.

Q. A lot of routes that the mules could have taken? A. Yes, sir.

Q. Did you see any mules up and down the roads there? A. No.

Q. Is it your testimony that you and Duke never found the mules then, is that correct?

Mr. Wulff: He didn't so testify.

Q. (By Mr. Robertson): Well, did you——

A. Well, we found some in the morning, we found three in the morning.

Q. You found some the next morning?

A. Yes, sir.

Q. Where did you find them?

A. They were roaming around there, around the corrals.

Q. Did you put them in the corrals?

A. Yes.

Q. Who was with you at that time?

A. Duke.

Q. Did you lock the gate? A. Yes.

(Testimony of Anthony Perine.)

Q. Now the night of the accident after you looked around for [100] a long time, you say you hadn't found any, is that correct?

A. Yes, sir.

Q. Did you come back to the corral later that night to see if any of them had come back?

A. I don't remember.

Q. You don't remember? A. No.

Q. You do remember going back the next morning, is that correct?

A. We stayed that evening and then we went on in the morning.

Q. And how long were you and Duke out looking for them the night before?

A. I would say a couple or three hours, anyway.

Q. Did you run across anybody else from the Southern Pacific looking for them?

A. I don't recall, no, sir.

Q. So far as you know there was just you and Duke from the Southern Pacific? A. Yes, sir.

Q. Now, the next morning when you came back to the corral, were there some mules in the corral?

A. Yes, sir.

Q. And there were some outside the corral, is that correct? A. There were three outside.

Q. Did you count them the next morning? [101]

A. Yes, sir.

Q. How many were there the next morning?

A. We had the full count outside of the two gone.

Q. Two were killed? A. Yes, sir.

(Testimony of Anthony Perine.)

Q. And was there another injured or something?

A. Yes, sir.

Q. Was there just the one mule in the corral that was injured? A. That is all I observed.

Q. You didn't observe any others? A. No.

Q. What was the type of injury that mule had?

A. I don't remember that.

Q. Are you familiar with the handwriting of R. Duke? A. Yes, sir.

Q. I will show you this book we referred to a moment ago and ask you to look at the right page. Is that the handwriting of R. Duke?

A. Yes, sir.

Q. And is this a book that is required by your company to be kept? A. Yes, sir.

Q. Your instructions are to keep it?

A. Yes, sir.

Q. Now, I notice in there it says—was this entry prepared [102] in your presence by Mr. Duke?

A. No, sir.

Q. I notice it says there, "28 and 27." That would be 55 head, is that correct, that were returned?

Mr. Wulff: Counsel, I will stipulate that the book is kept in the due course of business.

Mr. Robertson: You have no objection——

Mr. Wulff: I have no objection.

Mr. Robertson: I will read it into the evidence. It says, "28 and 27"—obviously that is 55 head.

Mr. Wulff: Counsel, please, the left-hand side is for the unloading.

(Testimony of Anthony Perine.)

Mr. Robertson: Yes.

Mr. Wulff: And the right-hand side for when it is diverted or reshipped.

Mr. Robertson: And it says, "December 18, 1954, 5:00 p.m.; consignee, H. L. Coons. Horses escaped from corral, ran on Yolo Freeway and two killed by autos. Turned over to reduction. One had bad lacerations of the front shoulder when corralled." Signed "R.L." I think it is, "Duke."

A. Robert L.

Mr. Wulff: May I have a stipulation, if you want to introduce that in evidence, that we can have a photostatic copy made and the original withdrawn?

Mr. Robertson: Yes. [103]

I would like at this time to offer the stock book, as it is called, both entries, left and right, as plaintiff's exhibit next in order, your Honor.

The Court: Let that be received and marked Plaintiff's Exhibit 11 at this time, with the understanding that the defendant may substitute photostatic copies of those two pages. At the present time those are the only pertinent pages in the book.

Mr. Robertson: Thank you, your Honor.

(The document referred to was marked Plaintiff's Exhibit No. 11 in evidence.)

Mr. Robertson: And if it please the Court, again, having put in the testimony of Mr. Perine, I would like to reoffer at this time Plaintiff's Exhibits 9

(Testimony of Anthony Perine.)

and 10 for identification in evidence. I think they all tie into his testimony, may it please the Court.

Mr. Wulff: Same objection.

The Court: The objection is sustained. I don't see that they are any help to me at this time at all. If you have a map of that area there, as I have already suggested, it would be of some help. These photographs were taken ten months later, and by the law of nature things have changed considerably, and if they are for illustrative purposes only, a map would be better.

Mr. Robertson: I am offering them only for the limited [104] purpose, your Honor, of showing this open area unenclosed where these horses and mules were being fed outside the corral, as this witness has testified of his own express knowledge. I am not offering them to show——

The Court: If the witness has testified to it, what is to be gained by putting the photographs in?

Mr. Robertson: I think your Honor is right. Thank you.

Q. Mr. Perine, one or two other things: The day following this accident the remaining mules that were in the S.P. corral were shipped out again, is that correct? A. Yes, sir.

Q. Do you know where they were shipped to?

A. I think they went to Petaluma.

Q. The two box cars that brought these mules, did they remain spotted there at the corrals from the 16th to the 18th of December?

A. I don't remember that.

(Testimony of Anthony Perine.)

Q. You don't have any recollection one way or the other? A. No, sir.

Q. Did you supervise their loading for shipment to Petaluma? A. I was there, yes.

Q. And was Mr. Coons there?

A. I think he was, sir.

Q. When they were reloaded and shipped out, did you give him any kind of receipt for the animals, or any document of any [105] kind?

A. He had to make that before the animals were shipped out. Before I got notified to load them, he had to make a bill out for them.

Q. He made that out at the company, did he?

A. Yes, before they called me to load them.

Q. And then when he came out to the stockyard and you were there, when they were loaded did he give you any paper or did you give him any document of any kind? A. No, sir.

Q. When the mules were brought in on the 16th of December and loaded in the pen, did you give him any document in writing or did he give you any document in writing? A. No, sir.

The Court: Who had the waybill on these animals?

The Witness: I guess it is 12th Street, sir.

Mr. Robertson: That is all, your Honor.

The Court: Any questions, Mr. Wulff?

Mr. Wulff: Yes.

The Court: Go ahead.

(Testimony of Anthony Perine.)

Cross-Examination

By Mr. Wulff:

Q. I think you testified, I am not too clear, that when you came there about 10:00 o'clock in the morning of the 16th, Mr. Coons, who is the—was he the owner, do you know, of the horses? [106]

A. Yes, sir.

Q. And was he the consignee, do you know that?

A. I didn't know it at the time, but I seen him there, so I knew that they were his.

Mr. Robertson: I will move to strike that as calling for an opinion and conclusion of the witness.

The Court: The last portion may go out; the portion of it that "I saw him there" may stand, the rest may go out.

Mr. Robertson: Yes, thank you.

Q. (By Mr. Wulff): Now, Mr. Perine, did Mr. Coons receive a good many shipments of horses at the Washington corral?

A. Yes, sir.

Q. Prior to this time?

A. Yes, sir.

Q. Can you give the Court any idea how many shipments came in, do you know?

A. Oh, I would say anywhere from 30 to 50 loads, anyway.

Q. And were they generally horses, what are called "chicken horses," bought for chicken feed?

A. Yes.

Q. And on these prior to this time did Mr. Coons carry out the same policy and practices?

A. Yes, sir.

Q. That is, he unloaded them?

(Testimony of Anthony Perine.)

A. Yes, sir. [107]

Q. And fed them and watered them?

A. Yes.

Q. And took complete charge of them?

A. Yes.

Q. When you saw them on that day, you expected the same thing to occur again, did you not?

A. Yes, sir.

Mr. Robertson: I object to that, your Honor, as calling for an opinion and conclusion of the witness and not the best evidence. The uniform livestock contract that we have made demand for is the best evidence. We have filed a written demand——

Mr. Wulff: I understand, but——

The Court: Now, wait a minute, both of you. The question that is before this Court is the question of negligence, and I think that the usual and ordinary practice is of some value. I will let him answer. There is no contractual liability before this Court at this time.

Q. (By Mr. Wulff): Now, did Mr. Coons supply the feed that was fed to these horses?

A. Yes, sir.

Q. Do you know what type of feed it was?

A. It looked like bean straw.

Q. Bean straw. And where did he have it piled with reference to the corral, do you recall? [108]

A. In front of the corral.

Q. Outside of the wooden area?

A. Yes, sir.

(Testimony of Anthony Perine.)

Q. Now, was that the same bean straw that you testified to that the horses were eating on?

A. Yes, sir.

Q. The next day? A. Yes, sir.

Q. Now, on the 16th and 17th of December, did you know whether Mr. Coons was going to ship the horses himself or truck them away from there, or he was going to reship them over the rails, did you know that? A. No, sir.

Q. Now, in the past sometimes, did he not sometimes ship them away by truck from the corral?

A. Yes, sir.

Q. And sometimes he diverted them to Santa Rosa and other places? A. Yes, sir.

Q. Now, when a cattle shipment is consigned to Sacramento at its point of destination, I believe you testified you did not feed any cattle unless the consignee could not be found? A. Yes, sir.

Q. Now, in this case Mr. Coons was the consignee? Did you know that? [109]

A. Yes, sir.

The Court: You used the term "cattle." I assume you are referring to animals or——

Mr. Wulff: Livestock.

The Court: ——livestock. As far as I know there are no cattle involved in this case, is there?

Mr. Robertson: No, your Honor. It is all horses.

Q. (By Mr. Wulff): Now, can you tell us approximately how far—I will withdraw the question.

Did you see the dead horses that were killed in this accident? A. No, sir.

(Testimony of Anthony Perine.)

Q. —on the highway? A. No, sir.

Q. You didn't order them to the reduction works, did you? A. Pardon me?

Q. Did you order these horses to be carried to the reduction works? A. Yes, sir.

Q. Did you see where they were located?

A. No, sir.

Q. Do you know whether Mr. Coons ever supplied any locks or means of fastening the gates other than by the wooden bar?

Mr. Robertson: Just a moment. I object to that as assuming something not in evidence. The corrals are owned by [110] the S. P., not by Mr. Coons.

Mr. Wulff: Mr. Coons had the use and enjoyment of it.

The Court: I think the question is immaterial. I will sustain the objection on that ground.

Q. (By Mr. Wulff): Now, you spoke about feed bins. Did each corral have a feed bin?

A. Of one type or another, yes.

Q. One type or another. Were there two types of bins? A. There is three types.

Q. That were used over there? A. Yes.

Q. Now, just describe each type that were used.

A. You want me to describe them?

Q. Yes.

A. Well, there is some made in a box form, and then there is one that is made like a big box, and then there is a kind that comes straight down like a manger.

Q. Now, irrespective of what type, could hay,

(Testimony of Anthony Perine.)

beans, or hay, as the case may be, be fed to them without getting in the mud? A. Yes.

Q. And that was the condition existing on the 16th and 17th days of December?

A. Yes, sir.

Q. Did you see any hay there?

A. Just beans. [111]

Q. That is all you saw? A. Yes, sir.

Q. Now, I understand you got a call, they asked you to call the chief dispatcher and you talked to the chief dispatcher in Sacramento?

A. Talked to his office, yes, sir.

Q. And he told you that there were horses on the S. P. right-of-way? A. Yes, sir.

Q. Tell the Court where that S. P. right-of-way would extend. Is it the main line track or——

A. Yes, it is a main line track.

Q. And do you know whether or not there were any slow orders given then because there were horses loose on the main line track?

Mr. Robertson: Objected to——

The Court: Sustained.

Mr. Robertson: ——as incompetent, irrelevant and immaterial. This witness——

The Court: Sustained.

Mr. Wulff: May I make an offer, if the Court please? The reason why he was called was that there were horses loose on the main line track, and his job was to get them off of the main line track.

The Court: I am away ahead of you. I have already [112] supposed that that is why you were offering that testimony. But whether any slow

(Testimony of Anthony Perine.)

orders were given or not wouldn't have any bearing upon this case at all.

Mr. Wulff: Because the obligation of railroad men is to go five miles an hour, and the idea is to get rid of that slow order so that trains may operate at the usual rate of speed.

The Court: I understand all that. In other words, when it is reported that there are animals on the right-of-way, if it is an enclosed right-of-way the railroad trains run at their own risk up until the time they get those animals off of there.

Mr. Wulff: And the S. P. gives slow orders to all their train operators——

The Court: Well, whether they did or didn't, maybe—if there was someone suing about the value of the stock, I might be inclined to listen to your testimony about whether there were slow orders given or weren't given, but the animals were way over on the highway, they were not on the right-of-way. I got the purpose of your offer.

Q. (By Mr. Wulff): I assume you went over there then with the idea in mind of rounding up the cattle or the livestock, did you not?

Mr. Robertson: I object to that as calling for an opinion and conclusion of the witness.

The Court: Well, I think the answer to that is going [113] to be no, anyhow, because there is no cattle involved.

Mr. Wulff: Livestock. I beg your pardon. Let's say horses and mules so it won't be confusing.

(Testimony of Anthony Perine.)

Q. I am trying to determine what was your purpose of going there.

A. It was to get them off—get them in the corrals.

Q. You knew, did you not, that so long as horses were loose, they could get back on the right-of-way?

A. We knew they were still out, yes, sir.

Q. You knew that?

A. Well, I presumed that.

Q. Therefore it was your job to get them in?

A. Yes, sir.

Q. Now, when you came to the corral around 9:00 o'clock that night, did you make any inquiries to find out how many mules were loose or how many mules were back in the corral?

A. I talked it over with Duke, yes.

Q. Did he know?

A. He knew some were missing, yes, sir.

Q. He knew there were some in the corral and some were missing?

A. Yes, sir.

Mr. Wulff: I think that is all.

Redirect Examination

By Mr. Robertson:

Q. Mr. Perine, there is no outside fence enclosure outside of the corral itself, is there, where these [114] mules were grazing?

A. Some of it was and some of it wasn't.

Q. There was an opening where they could get

(Testimony of Anthony Perine.)

out and go down the road somewhere, is that correct? A. I would say so.

Q. And in whose name did you have the mules sent to the reduction plant, the dead mules?

A. I don't—probably said S. P. so he could find them.

Q. I didn't hear that.

A. I don't know exactly what I told them. I think I told them there was two dead horses to pick up.

Q. Did you contact the reduction plant directly?

A. I have a phone there, yes, sir.

Q. Did you tell them who you were and you were with the S. P. Company? A. Yes, sir.

Q. Did you ask them to pick up the mules?

A. Yes, sir.

Q. And take them over to the reduction plant?

A. Yes, sir.

Q. For S. P. Company? A. Yes, sir.

Q. What is the name of the reduction plant?

A. I think it is Marks Bone something, they call it.

Q. March Bone? Do you know where that is located? [115]

A. I think it is out here towards—I have never been to the plant.

Q. Out west of Sacramento somewhere?

A. I think so, yes, sir.

Q. One other thing, Mr. Perine, when you feed animals in that corral where do you feed them when there is mud in the corral?

(Testimony of Anthony Perine.)

A. Oh, I have fed them—I feed them in the bins and sometimes I put it along the edges.

Q. Along the edges of the ground?

A. Yes, sir.

Q. Have you ever fed them outside of the corral? A. No, sir.

Q. Mr. Perine, is there any portion of the Southern Pacific corrals in West Sacramento that have a roof or cover over them?

A. Yes, sir, there is a little.

Q. How much area would that be?

A. Oh, I couldn't say how much it covers. It is not very much.

Q. Have you got any estimate at all?

A. 30 or 40 feet.

Q. Could that area of 30 or 40 feet accommodate 57 horses and mules? A. I don't know.

Q. Pardon me? A. I don't know. [116]

Q. Well, have you ever had in excess of 50 horses and mules in that confined area that has a roof over it? A. No, not that I know of.

Q. Would you put those in that area yourself, 50 horses and mules?

Mr. Wulff: That calls for an opinion and conclusion of the witness.

The Court: Sustained.

Q. (By Mr. Robertson): Is that a regular roof covered over?

A. Well, I guess you'd call it a breaker, a shelter.

Q. You say it is 30 feet by 40 feet?

(Testimony of Anthony Perine.)

A. No, it is small. I would say it is about 30 or 40 feet long and maybe 12 or 14 feet wide at the most.

Q. Do you have any kind of a map or drawing of the corrals as of December 17, 1954, or prior to that date?

A. A map?

Q. A picture or drawing or plan of it.

A. In my possession, you mean?

Q. No, in the possession of your employer, if you know.

A. I don't quite get the question.

Q. Well, have you ever seen some blueprints of the corral, have you ever seen any pictures of the corral or artist's sketches or drawings?

Mr. Wulff: Counsel, I tried to find some and I couldn't find any. I think I know more about it than he does. He is [117] just a clerk, he doesn't have anything to do with the blueprints.

Mr. Robertson: He has only been in charge of the corral since 1941 or 1942.

Mr. Wulff: He hasn't been in charge of the corrals.

Mr. Robertson: That is what he said.

Mr. Wulff: No, he didn't say that.

Mr. Robertson: How about the witness to answer the question?

The Court: Well, wait a minute here.

Mr. Perine, have you ever seen any maps or drawings of the corrals and their surroundings out there in your work as an employee?

A. No, sir.

(Testimony of Anthony Perine.)

Q. Anybody ever tell you that any such plans or drawings existed?

A. Not that I know of.

Q. (By Mr. Robertson): Do you know how far it is from the corrals out to the freeway, Mr. Perine?

A. Well, if you walked over the tracks, oh, I would say a mile and a half to two miles.

Q. By tracks, you mean that spur track that goes to the—I guess that would be the south, wouldn't it? That spur track, is that the one you are talking about? Maybe I can clarify [118] that for you, Mr. Perine. I will show you this aerial photo, Plaintiff's Exhibit in evidence No. 6. Now, here is the bridge that goes into the main Capitol Avenue, I guess you call it, the Tower Bridge here (indicating). A. Yes.

Q. And here is the freeway, the eastbound lane; here is the westbound lane; here is the El Rancho Hotel here (indicating).

The Court: Are you giving this to test his credibility or do you just want the facts?

Mr. Robertson: I want the facts, your Honor.

The Court: Can't you go out there in an automobile and measure it, drive it and find out how far it is? When you get through with this fellow here, he will only be guessing, apparently.

Mr. Robertson: I want to ask him one particular point about this right-of-way.

The Court: All right, proceed.

Q. (By Mr. Robertson): Is this curved line

(Testimony of Anthony Perine.)

along here that runs to the south—these are your corrals here, do you understand that (indicating)?

A. Yes.

Q. Do you understand this photo? I mean the highway, the corrals, the roads and the bridge here?

A. Yes, sir.

Q. These are the S. P. main lines, is it. up here, on along [119] through here, here is your corrals.

A. Yes, sir.

Q. Now, is this a spur track here that goes out across the highway that you spoke about when I first questioned you?

A. Yes, sir.

Q. Is that spur track open so that if the animals get out of the corral they could walk right down that spur track and go across to the freeway?

A. Yes.

Q. There is nothing there to stop them from doing that?

A. No, there is nothing to stop them.

Mr. Wulff: Let's see what you are talking about.

Mr. Robertson: I said is this spur track from the corral the way——

Mr. Wulff: That isn't a spur track. That is the Port District main line track.

Mr. Robertson: Whatever it is.

Q. Is this Port District main line track open along here where the animals could come out of the corral and go right down that and cross the highway?

A. I think so, yes, sir.

Mr. Robertson: That is all, your Honor.

The Court: All this testimony makes it more and

(Testimony of Anthony Perine.)

more clear to me that what we need of this area is a map and then we won't have to be guessing and assuming and trying to figure out [120] what that photograph there means.

Mr. Robertson: Mr. Miller and I are going out and try to get a map tonight, your Honor. We called at noon, your Honor, and we are trying to make arrangements to do that.

Mr. Wulff: May I ask a couple of more questions, your Honor?

The Court: You can ask them, yes, but is it going to be a couple or are you going——

Mr. Wulff: I have three, your Honor.

The Court: Well, you better wait until after recess, because I know these "two questions."

(Recess.)

Recross-Examination

By Mr. Wulff:

Q. Can you tell us the Southern Pacific employee who was in charge of the Washington corrals, if you know? A. I think Mr. Fisher.

Q. Mr. Fisher, the Freight Agent?

A. Yes, sir.

Q. Now, you spoke about a cover being in the corral. Is this a cover straight through two corrals?

A. Yes, sir.

Q. Isn't it about 30 feet in each corral?

A. I wouldn't say on measurements. It extends in both corrals.

(Testimony of Anthony Perine.)

Q. On two corrals, covered? [121]

A. Yes.

Q. Now, you have observed Mr. Coons over a substantial period of time, have you not?

A. Yes.

Q. Can you state whether or not he is an experienced livestock man?

A. Yes, sir, he is a good one.

Mr. Wulff: That is all. Those are my three questions, your Honor.

Redirect Examination

By Mr. Robertson:

Q. Were the horses and mules that were unloaded from the train on December 16 put in the corrals that had covers over them?

A. No, sir, he had them in different corrals.

Q. What is that?

A. No, he had them in different corrals.

Mr. Robertson: That is all.

Recross-Examination

By Mr. Wulff:

Q. But he could have put them in that corral, could he not, if he wished to? A. Yes, sir.

Mr. Wulff: That is all.

If your Honor please, I was just served late yesterday afternoon with a demand and I am in position to state to the Court that there are certain things we haven't got and certain [122] things we

(Testimony of Anthony Perine.)

have got. Is this the proper time to present what they wish?

Mr. Miller: Mr. Wulff, we are running so short of time here, and I would like to get Mr. Houck, a highway patrolman, on this afternoon if at all possible.

Mr. Wulff: Very well. I am in a position to conform to everything we can possibly conform to.

Mr. Robertson: I don't think we will need those materials until tomorrow morning.

Mr. Wulff: We have them available.

Mr. Miller: Thank you.

Your Honor, may it please the Court, I am Mr. Miller. I would like to take over the questioning at this time of the highway patrolman who was at the scene of the accident.

The Court: As I told Mr. Wulff this morning, I am not going to tell you gentlemen how to run your case. Anybody that wants to can ask questions as long as they are admitted to practice before this bar.

Mr. Miller: Thank you, your Honor.

GEORGE HOUCK

called as a witness on behalf of the plaintiff; sworn.

Direct Examination

By Mr. Miller:

Q. Mr. Houck, will you state your residence, please?

A. I live in West Sacramento, 1938 Maryland Avenue. [123]

(Testimony of George Houck.)

Q. And what is your occupation, sir?

A. I am a highway patrolman, California Highway patrolman.

Q. And how long have you been a California highway patrolman?

A. Eight years, approximately.

Q. And are you assigned to the West Sacramento area?

A. Well, it would be Yolo County, is what it amounts to.

Q. And how long have you had that assignment, sir?

A. I have been there five years.

Q. And does that area include what is known as U.S. 40 or what is the West Sacramento Freeway?

A. That is correct.

Q. And what portion of the West Sacramento Freeway do you cover?

A. Well, all the way from the causeway into Sacramento.

Q. That is the Yolo Causeway into the City of Sacramento?

A. Well, I patrol the whole road clear to Davis, usually, when I have that beat, to Sacramento.

Q. On December 16, 1954, sir, can you state whether or not you were on duty?

A. I was.

Q. And what were your duty hours on that day?

A. When I started to work until 6:00 o'clock that night. I did work longer that night.

Q. And can you tell me, sir, whether it came to your attention during the course of that day that

(Testimony of George Houck.)

there were animals, horses [124] and mules on any area of the West Sacramento Freeway?

A. Yes. I received a call at approximately 5:30, I believe it was, informing me that there were horses on the freeway and the location where they were.

Q. And what did you do, sir?

A. I proceeded to that point.

Q. And what was that point?

A. Well, it was in the vicinity of what we call the Riske Overpass, Ricke Lane, U.S. 40, the Freeway.

Q. I have a photograph here and I ask you to examine it and tell whether or not the overpass here is the Riske Overpass?

A. That is correct.

Mr. Wulff: May I see it, counsel?

Mr. Miller: Yes, certainly.

Mr. Wulff: That doesn't show——

A. This is the Riske Overpass (indicating).

Mr. Wulff: This is another picture.

Q. (By Mr. Miller): You are familiar with that entire area, are you not, sir?

A. Well, in the immediate vicinity of the roads. The rest of it I know, but I am not as familiar with it as I am with the roads.

Q. All right. I have two photographs. I would like to get them marked for identification.

Your Honor, these are photographs of the adjoining areas [125] and if it is satisfactory to the Court, I would like to have them admitted as one exhibit, labelled——

(Testimony of George Houck.)

The Court: I don't like to have exhibits split up.

Mr. Miller: All right. I would like to have this first one——

The Court: You can have them marked in sequence.

Mr. Miller: I would like to have this one marked, I believe it is 11 for identification.

The Court: It will be 12.

Mr. Miller: 12 for identification.

The Court: Yes. The first will be 12 for identification and the second will be marked 13 for identification.

(The foregoing photographs referred to were marked Plaintiff's Exhibits Nos. 12 and 13 for identification.)

Mr. Wulff: If your Honor please, I am assuming that is only introduced for the purpose of showing where the Riske Overpass is located.

The Court: It isn't introduced yet, Mr. Wulff.

Mr. Miller: These photographs will be introduced, your Honor, for the purpose of showing the location of a section of the West Sacramento Freeway the location of streets leading into the West Sacramento Freeway, the location of a railroad bridge coming across the West Sacramento Freeway—I believe, that is the Port District railroad bridge—and I believe, [126] while vegetation in the area may have changed, the roadways and railroad lines are the same as at the time of the accident.

(Testimony of George Houck.)

The Court: What is there about these photographs that may be more helpful than a map?

Mr. Miller: Well, your Honor, the witness will testify as to where certain of the animals were corralled prior to the accident, and it also illustrates it——

The Court: Well, can't that be shown on a map? When I used to practice law—I am not lecturing anybody on this thing—the first thing I prepared when I had a case of this sort was a map. I don't think there is anything in the world that can beat a map. It shows where, when and how something happens. I venture that Mr. Houck will bear that out. I think the first thing his department requires him to do is to prepare a map of the scene of an accident. Is that right, Mr. Houck?

A. That is correct.

Mr. Miller: Well, your Honor, I believe——

The Court: In other words, I am not saying now that I want to call a halt. I am just urging you to get a map prepared in this matter here.

Mr. Miller: Well, your Honor, the map, the purpose for which I am introducing this, to show the location of the mules and the fact that the mules had access to the freeway, this shows the distances in the area. I don't believe that a map [127] would illustrate where fences are located and where fences are not located.

The Court: Well, the maps I used to have made when I was trying cases of this sort, showed where the fences were, where the power poles were, the

(Testimony of George Houck.)

guy wires were, where lights were, where sign boards were and where everything else in the area was of any particular consequence, and they were made to scale and were easily read by anyone who wanted to look at them.

However, as I say, go ahead. I am just suggesting to you what would be helpful to me, and I think probably you will want to help me before we get through.

All right.

Q. (By Mr. Miller): Mr. Houck, I believe you stated that you are familiar with the area surrounding the West Sacramento Freeway.

A. Yes, sir.

Q. And can you state, looking at Plaintiff's Exhibit 12 for identification, can you state whether or not the highway running across the photograph is a portion of the West Sacramento Freeway?

A. That is correct.

Q. And it shows a railroad track coming across that freeway and leading to the left side of the picture. Now, can you tell me what railroad track that is?

A. Well, I know it runs from [128] Broderick—

Mr. Wulff: I don't know whether they join the stipulate that this is the Port District track which connects the Southern Pacific Company, Sacramento Northern, with the track that leads to the Port warehouse and Port facilities.

(Testimony of George Houck.)

The Court: If Sacramento was a bigger place, is that what you would call the belt line?

Mr. Wulff: Belt line railroad.

Mr. Miller: Will you also stipulate, counsel, that this track passes in the area of the Southern Pacific corrals in Broderick?

Mr. Wulff: I don't know whether they join the S.P. property or not, but it is in the vicinity.

Mr. Miller: Yes. Well, we have in mind, your Honor. I would like to offer Exhibit 12—oh, we might as well cover 13 while we are at it. This purports to show the highway running across from left to right on the picture. Can you tell me whether this is the West Sacramento Freeway?

A. That is correct.

Q. And can you tell me the name of the overpass that traverses the freeway?

A. That is the Riske Lane Overpass.

Q. The Riske Lane Overpass?

A. That is the way I have referred to it in the past, but whether that is the actual name, I am not certain.

Mr. Miller: Well, all right. [129]

Now, with that in mind, your Honor, I would like to offer these two exhibits, Nos. 12 and 13, in evidence.

Mr. Wulff: With this one understanding: If there is something, if your Honor please, that wasn't there in December, 1954, we will be in the position to show it. I don't know, as far as I can

(Testimony of George Houck.)

see, they appear to be all right. They were taken over a year later.

The Court: When were they taken?

Mr. Miller: These pictures were taken yesterday, your Honor.

Q. I might ask you this: Were these landmarks that I pointed out, the freeway, the Riske Overpass and the road coming onto the freeway from Riske Overpass, the railroad bridge, were all of those objects existing at the time of this accident on December 17, 1954?

A. That is correct; they were. They were existing then.

The Court: Mr. Houck, there has been some reference to a railroad bridge. What bridge are you talking about there?

Mr. Miller: That is one of the overpasses over the freeway.

A. I don't know exactly what the number is or the name is.

Mr. Wulff: That is the same belt line, your Honor.

The Court: To me a railroad bridge is a bridge where a railroad goes across. That is what I am puzzled about. Is there a bridge that a railroad goes across, or is there an [130] underpass or subway or whatever you want to call it, or what is the situation?

A. What I understand is that it is an overpass over the freeway on which the trains travel.

The Court: In other words, the trains run over the freeway on——

(Testimony of George Houck.)

Mr. Wulff: That is right.

A. Run over an overpass over the freeway. The freeway is the roadway.

The Court: Yes, I understand that.

A. And the overpass is the train track.

The Court: It is Highway 40?

A. U. S. 40.

The Court: U. S. 40, from Davis to Sacramento.

Q. (By Mr. Miller): And, Mr. Houck, that railroad overpass to which you refer is shown at the right-hand side of Exhibit 12 for identification?

A. Yes.

Mr. Miller: With that, your Honor, I would like to offer these two photographs in evidence.

The Court: Let me see them.

(The photographs were handed to the Court.)

The Court: Where is this overpass, this railroad overpass, where is it with reference to the scene of the alleged accident?

Mr. Miller: The scene of the accident, your Honor, is at [131] the extreme left-hand side of the photograph.

The Court: Well, for what they are worth, they can be admitted in evidence as Plaintiff's Exhibits 12 and 13.

Mr. Miller: Thank you, your Honor.

(The photographs referred to were admitted in evidence as Plaintiff's Exhibits Nos. 12 and 13.)

(Testimony of George Houck.)

Q. (By Mr. Miller): Mr. Houck, following the receipt of information from your headquarters that mules were loose on the freeway or in the area of the freeway, what did you do?

A. I proceeded to the scene where the animals were last seen, which is approximately the Park Overpass.

Q. What did you find there?

A. Well, I found the deputy sheriff. The deputy sheriff had been attempting to corral them and he had them at this time behind a ditch right next to the Cal Central yard.

Q. Could you show me on Exhibit No. 13 the point at which the mules were corralled?

A. Do you want me to mark it?

Q. Yes. Will you mark it with an X?

(The witness marks on photograph.)

Mr. Miller: We will identify this——

Mr. Wulff: Put his initials opposite it.

Mr. Miller: Yes. I was going to mark it "H-1," if that is satisfactory to the Court and counsel.

The Court: Was this before or after the accident? [132] A. This was before.

The Court: Well, did they get out again?

A. Well, we don't know whether they got out or whether there were others in the vicinity. No one knows.

The Court: Well, that is what I am wondering. How does this evidence help me?

Mr. Miller: Your Honor, this shows the mules

(Testimony of George Houck.)

which were corralled in the area in which the accident occurred.

The Court: Well, there isn't the slightest doubt in my mind that there were some mules out on the highway there and that they were struck by the automobile here, by Mr. Grigg's automobile.

Mr. Wulff: That is correct, your Honor. Our defense is that they weren't S.P. mules.

The Court: Certainly somebody is going to have a difficult time convincing me that there weren't some mules out there that Mr. Grigg ran into.

Q. (By Mr. Miller): Mr. Houck, I will show you Plaintiff's Exhibit 2 which has been admitted to be a view from the Park Street Overpass looking toward Sacramento in an easterly direction. Do you recognize this as a view from Park Street Overpass?

A. It looks as though it is a view from the Park Street Overpass; I mean it is a part of the overpass, but it beyond the actual—— [133]

The Court: What number is that? Is that No. 2?

Mr. Miller: That is No. 2.

The Court: That, according to the information that I have here, was taken 50 yards east of the bridge.

Mr. Miller: Yes.

The Witness: That is what it looks like.

Mr. Miller: May we have No. 1?

The Court: Here is No. 1 laying up here. That is the one that has already got the marks on it.

Q. (By Mr. Miller): I will show you Plaintiff's

(Testimony of George Houck.)

Exhibit first in order. Do you recognize this as taken from the top of the Park Street Overpass?

A. That is possible. It looks as though it has been.

Q. Yes. Now, that, taken in conjunction with 2—2 is taken about 50 yards closer to Sacramento?

A. Yes.

Q. Now, after you had observed the animals which were corralled, as marked on Plaintiff's Exhibit 13, did you have the opportunity of observing any other mules in the area?

A. Yes, I did. I was at this position marked on map (indicating)——

Q. As H-1?

A. That is correct. I was on the shoulder of the road there, the north shoulder.

Q. And about what time of the day was [134] this?

A. It was somewhere around 6:00 o'clock.

Q. And what did you observe, sir?

A. Well, I looked west, it was, and silhouetted across the highway approximately, oh, four or five blocks down, I could see three mules or horses running across the highway.

Q. On which side of the highway was that?

A. That would be the eastbound lane; that would be the north side.

Q. And approximately what location on the eastbound lane did you see these mules and horses running across the highway?

(Testimony of George Houck.)

A. Well, they were on what would be a part of the drop-off on this Park Overpass.

Q. Can you indicate, sir, on Plaintiff's Exhibit 2 the approximate location of the horses and mules?

A. The perception is not quite clear. From where I was on the map there it would have been four or five blocks.

Q. Would it help to have the other photograph?

A. It would help. The perception is not quite what it would have been ordinarily.

Q. This is No. 5, which has been introduced, taken at a point 250 yards east of the Park Street Overpass.

The Court: I have got that down 200 yards.

Mr. Miller: 200 yards.

The Court: That is what I have got. Now, if I am wrong, I want to be corrected. Do you have that, Mr. Robertson? [135]

A. In other words, it was in this approximate vicinity.

Q. (By Mr. Miller): And in which direction were the mules running?

The Court: Wait a minute. Let's get this straightened out.

Mr. Robertson: What exhibit do you have?

The Court: No. 5.

Mr. Robertson: No. 5, camera at a point 250 yards east of the bridge.

The Court: I have got it wrong. I wanted to get that straightened out. 250 yards east.

(Testimony of George Houck.)

Mr. Robertson: 250 yards east of Bridge 22, facing west.

Mr. Wulff: Is Bridge 22 the same one he has been talking about as the Riske Overpass?

Mr. Miller: No, that is the Park Street Overpass.

Q. Is it your testimony, Mr. Houck, that this Plaintiff's Exhibit 5 represents the approximate area in which the mules and horses were located?

A. That is correct.

Q. And you state that they were running across the freeway at that point?

A. They were going south.

Q. And what did you do then, Mr. Houck?

A. Well, to get back to that location I had to go over the Riske Overpass back into West Sacramento and down to Park Overpass [136] and come in on the approaches there, and as I came in, I was below what had already occurred, an accident.

Q. And what did you see that had occurred?

A. I beg your pardon?

Q. What did you see that had occurred?

A. You mean from where I was or after I got up to the scene?

Q. After you got up to the scene?

A. Well, I saw a couple of dead horses and I saw one Cadillac that had the front end smashed in and another pick-up truck that was on the north shoulder that had sustained some damage.

Q. Did you see any other animals in the area other than the two dead mules?

(Testimony of George Houck.)

A. Yes. I was chasing them around there for the next hour or so.

Q. There were still other animals that were in and about that area?

A. There were quite a few.

Q. Now, what were the weather conditions at this time?

A. Well, the fog was beginning to set in. At that time it wasn't bad.

Q. What would say your visibility was? How far could you see at that time?

A. You could see quite a distance. As I say, the fog was floating in in spots. It wasn't solid.

Q. At the point where the accident occurred, would you say [137] the visibility was good?

A. Yes.

Q. Was it dark at that point? Was it necessary to use headlights?

A. Yes, it was dark at that time, very dark.

Q. Did you observe any skid mark from Mr. Grigg's car, the Cadillac?

A. I assume they were from the Cadillac. They led right up to it. They were approximately a hundred feet long.

Q. And what was the location of his car?

A. The front end was just over—over the bank, I suppose you would say, over the roadway there, and the back end of the car was on the roadway, in the east lane, it would be in the passing lane of the east lane, actually, facing north, actually.

Q. This car was facing almost north?

(Testimony of George Houck.)

A. Almost north.

Q. I will show you here where Mr. Griggs has drawn on Plaintiff's Exhibit 1 what he has considered to be the location of his car. Do you have any corrections to make to that?

A. Well, I would say it was just a little farther over the shoulder there, maybe three or four or five feet.

Q. But with the exception of that, is that a fair drawing of the location of the car?

A. That is substantially correct. [138]

Q. Did you have an opportunity to observe Mr. Grigg's condition at the time?

A. I did observe him. As I say, I was rather busy. What kind of condition?

Q. Well, his physical condition.

A. Well, he had been injured; that is, there was a cut on his hand that seemed to me rather severe, and that is all I can recollect.

Q. Did you have the opportunity to notice whether there was any damage to the windshield of the automobile?

A. Well, all I can testify to is the impression. The impression that is left in my mind was that it was damaged. The extent, I am not certain.

Q. Mr. Houck, coming off the top of that Park Street Overpass, can you tell me what the physical contours of land are at that point? In other words, what I am trying to get at is this: Is there a drop off on the left-hand side and the right-hand side of that roadway at that point?

(Testimony of George Houck.)

A. That is correct. It is built up a considerable distance above the Park Street road there below.

Q. And how deep is that drop there, would you say, sir?

A. Oh, approximately 20 to 30 feet. It depends on the exact point; where the accident occurred, as I say, I rode all the way down; it is at least 20 feet.

Q. Did you observe mules down in that gully there? [139]

A. Live ones?

Q. Yes.

A. There were live ones running around between the roadways.

Q. At that time?

A. At that time.

Q. From the physical surroundings of the accident, were you able to form an estimate as to Mr. Grigg's speed?

A. You mean my impression or opinion?

Q. Yes.

The Court: I don't want any impressions. In other words, if you are in a position to give us an opinion which you can back up in some fashion, why, you can answer the question yes or no, but——

A. Well, I can go on——

Mr. Wulff: May I have that question reread? It is a little bit difficult to hear once in a while. I don't comprehend the question.

(Question read.)

The Court: And then the witness said, "Impression?" in a querulous voice, and I responded to that by saying I didn't want any impression but if he

(Testimony of George Houck.)

formed an opinion with reasonable certainty, I would determine whether or not I would permit him to give that when I determine what that is based on.

Mr. Wulff: I would be interested in hearing the basis of any opinion before we have the opinion, your Honor. [140]

The Court: Naturally.

A. The basis of the opinion would be the extent of damages to the mules and the car.

Mr. Wulff: What is that?

A. The basis of the opinion would be the extent of damage to the mules and the extent of damage to the automobiles and the length of the skid marks. There was a skid mark left by the Cadillac that was involved in the collision with the mules, and the mules and the Cadillac both sustained damage, and from those I can approximate the speed.

The Court: The testimony is that the Cadillac was involved in a collision with two mules, not one, but two mules.

A. I don't know. There were two dead animals.

The Court: Well, that is where you get into trouble, you see, assuming something——

A. I see what you mean.

The Court: It would make a difference if you hit two mules than if you hit one mule.

A. Oh, yes, it would make a difference. I mean I couldn't actually determine what difference it would make; all I can do is approximate.

The Court: Well, proceed.

Mr. Wulff: May I ask one question? Have you

(Testimony of George Houck.)

had any scientific experience in this, or is it just from observation?

A. Just from observation, no scientific [141] training.

Mr. Wulff: You have had no special training on that, just practical training——

A. That is right, eight years in highway patrol work——

The Court: Well, you had to go to school out here, too didn't you? A. Yes, that is correct.

The Court: And you have to go back for training from time to time? A. That is correct.

The Court: And as part of the training they teach you to analyze an accident after you see it?

A. Yes.

Mr. Wulff: Did you have any training in estimating speed from that source of information ?

A. Well, I have had eight years of estimating speed. You get pretty accurate at it.

Mr. Wulff: I will withdraw the objection.

Q. (By Mr. Miller): Based upon your experience in the items you observed at the scene of the accident, what would you say you would approximate Mr. Grigg's speed at?

A. I would say it would be anywhere from 40 to 50 miles an hour. I couldn't be any more specific. There was no citation involved, because of that opinion.

Q. Mr. Houck, in your opinion, what would you say was a safe and reasonable speed at the time of the accident for a car [142] traveling in the direc-

(Testimony of George Houck.)

tion Mr. Grigg was traveling, going in the lane Mr. Grigg was traveling in?

A. Well, assuming that he was a competent driver, clear up to 65 miles an hour.

Q. Mr. Houck, did you, at the time you started to get these mules off the freeway, have an opportunity to put out any flares or any signals to warn drivers of automobiles concerning the danger of the mules?

A. No, I did not.

Q. Had any flares been thrown out by any other persons?

A. I couldn't say for certain if there had been.

Q. Following the accident, the next day following the accident, did you have the opportunity to examine the corral of the Southern Pacific in Broderick?

A. I went over there and I looked at it. I didn't examine it any more than just a casual glance at the condition.

Q. And from your examination of the corral what was the condition of the corral you saw?

Mr. Wulff: I object to that, your Honor. There is no evidence that the horses even got out of the corral.

The Court: Sustained.

Mr. Wulff: They were outside.

The Court: That is not a matter that even a highway patrolman can pass an opinion on. He can describe what he saw.

Q. (By Mr. Miller): What did you see, [143] sir?

(Testimony of George Houck.)

A. All I can do is speak in general terms; I don't remember anything specific. I can remember the impression that I got when I looked at the corral.

The Court: Mr. Houck, just tell us what you saw there. If you didn't see anything, why, you say so, but if you saw something there, why, you tell me what it was and let me form the impression.

A. Well, I saw the corral. Could I state the condition I thought it was in?

The Court: No, not the condition you thought it was in; the condition you saw it in.

Q. (By Mr. Miller): The condition that you saw it to be in?

A. Well, that is quite a while ago. I don't remember just exactly the condition that it was, other than the impression that I got, which you say would be an opinion if I stated it. I did make out a citation on the strength of the impression, and that is all I went on.

Q. Mr. Houck, as near as you can recall, can you state exactly what you saw? I realize it is difficult to do, but as near as you can recollect can you state what you saw with reference to the corral?

A. Well, this might not have been a part of the corral, it was where the horses were at the time that I arrived. It seems to me there was wire around this fence and in spots there was—— [144]

Mr. Wulff: May I object to that, if the Court please; that is not the corral, that is not the property we are talking about.

The Court: He is describing where the horses

(Testimony of George Houck.)

were when he got there. I am going to let him describe it in the interests of saving time. If it isn't the corral, I am not going to pay any attention to it.

A. Well, I am not a cattle man—excuse me.

The Court: Go head, Mr. Houck.

A. I am not a cattle man. I really don't know the difference between a corral and a fence and a yard. However, they were enclosed, and part of this enclosure was of wire, and part of it there wasn't too many wires. Part of it, it seems to me, that the wires sagged somewhat. As far as wood corners of the fence, I don't really remember anything specific.

Q. (By Mr. Miller): Did you examine the gates, sir?

A. No, I did not examine the gates.

Q. You stated you noticed Mr. Grigg had a cut in his hand and was bleeding, I believe. Can you tell me what care was given Mr. Grigg at the scene of the accident?

A. It seems to me he had a bandage around it, but then I am not certain. As I say, I was busy.

Q. Did another highway patrolman come up about that time, sir?

A. Yes, I believe there was, that there was another highway patrolman came up there at that time. [145]

Q. What was his name? A. Bob Jean.

Q. To save time, sir, did Mr. Jean take Mr. Grigg to the Mercy Hospital?

A. I believe he did. I am not certain. I didn't see him go, is what I mean.

(Testimony of George Houck.)

Q. Is it your memory that he was taken to the hospital by him?

A. It is my memory that he did.

Q. Now, as I understand your testimony, Mr. Houck, you saw these mules, you saw mules running upon the Park Street Overpass prior to the time the accident occurred, and by the time you got there the accident had occurred?

A. That is correct.

Q. And as near as you can fix it, what was the time of the accident? A. It was around 6:00.

Q. Would it assist you, sir, to fix the time, to look at the report that you helped to make out for the highway patrol? A. Oh, certainly.

Q. I show you a vehicle accident report, California Highway Patrol, name of officer, G. Houck, date of report is December 17, 1954, on a Friday, involving an accident. Can you state from that whether by observing that it helps you to place the time of the accident? [146]

A. Yes, it was just after six o'clock, approximately 6:15.

Q. Were there any other automobiles at the scene of the accident involving Mr. Grigg?

A. There were quite a few other automobiles. The road was blocked.

Q. And were there any other automobiles that were involved in this particular accident?

A. There was another, a pick-up truck.

Q. And was that driven by a Mr. and Mrs. Spansel?

(Testimony of George Houck.)

A. I believe that is the name. I don't——

Q. Wasn't there a Buick which had been following Mr. Grigg that hit the rear end of Mr. Grigg's car, to your recollection?

A. There was a party that admitted running into Mr. Grigg's Cadillac.

Mr. Miller: Thank you very much, Mr. Houck.

Cross-Examination

By Mr. Wulff:

Q. Just a few questions, Mr. Houck. Now you testified, I believe, that you received a call at 5:30 that there were horses on the freeway?

A. I believe it was approximately 5:30.

Q. Now, did you find out how long they had been on the highway, on the freeway?

A. I heard from the deputy sheriff, he told me how long they had been on, or how long he had been chasing them.

Q. And you investigated that, did you, looked into it and [147] ascertained——

A. That wasn't a part of the accident; it wasn't a part of any of the citations I issued.

Q. Would you mind telling us how long he had been chasing them?

Mr. Miller: I believe that would be hearsay, your Honor. Object to it on that ground.

The Court: The objection is sustained.

Q. (By Mr. Wulff): Mr. Houck, you are familiar with the freeway. Are there any stretches of

(Testimony of George Houck.)

that road on the eastbound lane where a person could see ahead to the east 50 feet or less?

Mr. Miller: I object. It would be immaterial unless it deals with the scene of the accident.

Q. (By Mr. Wulff): All right. Let's say between the causeway and the N Street Bridge.

Mr. Miller: I still object. That doesn't deal specifically with the scene of the accident.

The Court: Mr. Wulff, if I understood your question correctly, it isn't going to be of any help to me at all. I don't think you meant what you said, or what you asked for.

Mr. Wulff: I think you are right. I will reframe it.

The Court: All right.

Q. (By Mr. Wulff): Are there any stretches of the freeway from the causeway, the eastern end of the causeway to the western edge of the bridge, N Street Bridge, on the eastbound [148] lanes where the view of a traveler going in an easterly direction is limited to 50 feet?

Mr. Miller: I still object on the ground, first of all, that it is not limited to night conditions which existed here, and it is not limited to the scene of the accident.

The Court: The objection will be overruled. The scene of the accident was within the purview of that question.

A. No, there would be no portion of the road there that would be limited to 50 feet.

Q. (By Mr. Wulff): Can you give us any idea,

(Testimony of George Houck.)

in daylight now first, the minimum view at any place on the highway as far as curves are concerned? A. You want the roadway?

Q. That is right, the view of a traveler in the eastbound lane and going east.

A. Well, there is a turn on the top of the overpass there, I never stopped to determine the distance there, actually; you can see quite a way over the overpass. Of course, that is assuming it is a clear day.

Q. Is there any portion of that eastbound lane on Exhibit No. 6, any portion of the eastbound lanes where the view is restricted by any curve?

A. Well, it is restricted somewhat.

Q. What do you mean by somewhat?

A. Well, this is a sweeping down here, and as you come up [149] you are coming up (indicating).

Mr. Miller: May the record show that the officer has indicated the Park Street Overpass on the exhibit.

Mr. Wulff: All right.

Q. Now, appreciating, and counsel will agree with me, I assume, that one inch on the map equals 300 feet on the ground, what would be the—do you agree with that?

Mr. Miller: 340 feet.

Q. (By Mr. Wulff): 340 feet to one inch. I stand corrected. Now, could you give us there the restriction of view with that in mind?

A. You have to bear in mind, too, that there is no perspective here. This road is built up 30 feet or

(Testimony of George Houck.)

so and you are coming up over a hill, a slight hill, as you come up Park Overpass. Of course, you can't determine the amount of the grade there.

Q. (By the Court): When you get up on top of the Park Overpass, how far down the road can you see from there?

A. Oh, when you are on top of it, you can see quite a distance.

Q. What do you mean by quite a distance?

A. Well, it would be clear down the road, as I recollect.

Q. Clear down to at least where it goes under the overpass that the railroad runs on?

A. That is if you are on top, yes.

Q. (By Mr. Wulff): Now, I understand that you could see the [150] horses and mules running down the highway to a certain point. How far distant were you from these horses and mules you saw running down the freeway?

A. As I say, it was between four and six blocks, or approximately a half mile, just estimating.

Q. Now, how long after that did the accident occur?

A. Well, it happened in between the time it took me to make the circle over Riske Pass down West Capitol Avenue to Park Boulevard, and then the approach from Park Boulevard onto the freeway.

Q. Give it in minutes, please.

A. Oh, possibly five minutes.

Q. In five minutes? A. Yes.

Q. Therefore five minutes from the accident you

(Testimony of George Houck.)

could see how many blocks, five or six blocks, or a half a mile, is that correct?

A. Oh, yes, that is correct. That is correct, from where I was.

Q. Now, from 5:30 on weren't there quite a number of people trying to corral these horses and herd them?

A. Not to my knowledge; I don't know—oh, you mean from 5:30, from the time I arrived?

Q. From the time you arrived.

A. There were not a group of people. I was the only one there [151] for, oh, 10 or 15 minutes.

Q. Wasn't the sheriff there before you?

A. He was.

Q. Did you see Mr. Coons there?

A. They came afterwards, that is what the sheriff left for.

Q. The sheriff was trying to herd them, was he not?

A. The sheriff had already herded them before I even arrived.

Q. He had collected them in a certain locale, had he not?

A. He collected a part of them. I mean, whether there were others out or not, I don't know. No one else knows, that I know of.

Q. And you made an attempt to herd them, did you not?

A. I just kept them where they were. They were behind this ditch and there were trees there at the time—it doesn't show on the map.

(Testimony of George Houck.)

Q. In other words, you were doing everything you could do to prevent them from going out on the freeway?
A. Oh, naturally.

Q. There were flares put out, were there not, for some distance on the highway?

A. At what time?

Q. Prior to the accident.

A. There was one flare that was quite a distance from the scene of the accident and it was also quite a distance from [152] the roadway.

Q. Was that put out incident to the corralling of these horses?

A. It was put out to keep the horses in; it wasn't put out to warn people of danger.

Q. That was a part of the collecting or herding of the horses?
A. I beg your pardon?

Q. That was a part of the collecting or herding of the horses?

A. Well, I figured this red flare would keep them back from coming out on the highway. That was the only way I had means of while I investigated the other end. I didn't know whether it was open back up on the highway or not.

Q. You testified you made a citation on the question of some wire on the enclosure. Now, I am obliged to ask——

A. No, you have me wrong there.

Mr. Miller: The officer said you are wrong. I think you are proceeding on the assumption that the officer——

(Testimony of George Houck.)

Q. (By Mr. Wulff): I understood you to say you issued a citation? A. That is correct.

Q. Now, against whom did you issue that citation? A. It was Mr. Coons.

Q. Who is he, sir?

A. He is a man that claimed he owned the horses.

Q. Was that citation served on Mr. Coons?

A. That is correct. [153]

The Court: Will you be very much longer, Mr. Wulff?

Mr. Wulff: I beg your pardon?

The Court: Will you be very much longer?

Mr. Wulff: No, just one question, I think.

Q. When you spoke of a wire enclosure, you didn't mean that fenced corral, did you?

A. No.

Q. I am pointing now to Plaintiff's Exhibit 9 for identification, if the Court please.

You saw a fenced corral, did you not?

A. Yes.

Q. You made no investigation of the condition of that, did you?

A. As I say, I looked at it, I looked at the whole vicinity, and from that impression——

Q. That isn't the wire thing that you are talking about? A. No.

Q. Was there a stampede of the horses prior to the accident, after you were there?

A. What do you mean by a stampede?

Q. Wasn't the idea of the red flare there put in

(Testimony of George Houck.)

there to prevent the stampeding of the horses, or did you think that caused stampeding of the horses? That is what I am trying to find out.

A. Oh, there is no question about it; it didn't; the horses wouldn't approach this entrance or opening——

Q. Did you notice any stampede of the horses, running wild around?

A. They were running around in back there where they were aroused, so to speak.

Q. Well, I think you testified, Officer, that you had corralled a large group of horses at a certain location.

A. The sheriff had.

Q. Now, did those horses break away?

A. That I couldn't say positively, because I left, and as I say, I took this circuit up around to the scene of the accident, and from that time those horses could have. I don't know.

Mr. Wulff: That is all.

The Court: Well, it is a certainty that those horses that you had in that corral were not the ones you saw running up the road a half a mile from there, isn't that correct?

A. There is no way of actually knowing that that I know of, your Honor.

Q. How could you have horses in a corral there and have them running up on the highway a half a mile west of there?

A. This ditch runs for quite a distance, and there are trees. We couldn't even see the horses most of the time, all you could see were their eyes

(Testimony of George Houck.)

shining through the trees. We were halfway in between that point. They could have run out through that break.

The Court: Well, I understood you were down there at the [155] corral when you saw these horses running up on the—or you had them corralled and had the red flare out when you saw them running up onto the highway.

A. The flare was down quite a distance. It was at the opening. We were down at the middle talking to Coons and the other sheriff who brought them back. We were deciding exactly what we would do.

Q. This is all before the accident happened?

A. That was all before the accident happened.

Q. Nobody put any flares out at that time, knowing that there were animals loose there on the highway?

A. Well, we had a squad car there. Usually if there is any danger, I always put the red light on in the rear.

Q. Well, did you have a flash going? You have a flash, don't you? A. I do.

Q. Did you have it going?

A. As I say, I usually do under those circumstances. I can't say positively if I did at this time.

Q. Well, the thing that is puzzling me is that there are animals running loose on the highway, isn't the first thing you would think of to throw down flares to slow down approaching traffic?

A. We didn't know whether there were other animals around or not. We did believe we had them all

(Testimony of George Houck.)

corralled. Whether [156] those were the same that ran across the highway at that time or not, I don't know.

Q. But you saw some running out there on the highway, and no flares were thrown down even then?

A. As I say, it took me some time to get down there. Actually the moment I would arrive there I would put out flares or anything else to make it safe. We thought we had them all corralled. That was a mistake in judgment.

Redirect Examination

By Mr. Robertson:

Q. Mr. Houck, the animals you talk about having corralled, that was not in a fenced corral?

A. No, definitely not.

Q. And that was east of the scene of the accident six blocks, is that correct?

A. Oh, at least.

Mr. Wulff: If your Honor please, I object to leading questions.

Mr. Robertson: Your Honor, there is no jury here. I think there is some confusion and I want to clear it up.

The Court: Why don't you let Mr. Miller do it? He is the one who is examining the witness here. Let him finish.

Mr. Robertson: All right.

Q. (By Mr. Miller): Mr. Houck, will you indi-

(Testimony of George Houck.)

cate on Plaintiff's Exhibit 13 the approximate point where the flare was placed. Mark it with an X and I will put "H-2."

A. Well, I can't tell exactly how far this runs, but it runs [157] a considerable distance, maybe three-quarters of a mile, and at that time, as I say, there were trees all along there. Where these horses were in that stretch, we don't know, I don't know. As I say, even one time I came around here to see if there was another opening in this end. It was clear down here (indicating) where the flare was. The flare would have been right in through here somewhere.

Q. All right. Indicate this with an X here? (Indicating.) A. That is approximately.

Q. And put "H-2," for the approximate location of the flare.

(Marking on exhibit.)

A. Yes.

Q. Now, sir, can you state whether the flare was on the easterly side of the point where Mr. Grigg collided with the mules?

A. Well, I can put it this way, that it was at a point where no one from the top of Park or beyond Park, west of Park, could have seen.

Q. Would Mr. Grigg have an opportunity to see that flare before the collision with the mules?

A. If he did it would be only a fleeting glance at the moment.

Q. Now, sir, on cross-examination there was

(Testimony of George Hanks.)

quite a bit of testimony concerning—well, first I would like to ask you this: Can you explain how, when, as you stated, it was very dark, you were able to see these males up on the Park [158] Street Overpass?

A. I saw them through the headlights, they were silhouetted.

Q. You say they were silhouetted?

A. That is correct.

Q. Would you have been able to see them under the conditions had they not been silhouetted?

A. I could not have seen them without the aid of the lights coming toward me.

Q. Without the aid of the headlights coming toward you? A. That is right.

The Court: I think we must take the afternoon recess.

Mr. Miller: Your Honor, I just have a couple of more questions.

The Court: Well, I am not through here. There are a couple of things I am not satisfied with. I regret it. You should have called the witness to the stand sooner.

Take a recess to the hour of 10:00 o'clock tomorrow morning.

(Thereupon, an adjournment was taken until Wednesday, March 7, 1968, at 10:00 o'clock a.m.) [159]

Wednesday, March 7, 1956—10:00 A.M.

GEORGE HOUCK

resumed the stand and testified further as follows:

Redirect Examination

(Resumed)

Mr. Miller: Your Honor, after court adjourned yesterday, Mr. Robertson and I went over to the Department of Public Works and obtained from them an official plan and profile of the area of the West Sacramento Freeway. I believe that Mr. Wulff will stipulate that this is an official map and a true and accurate representation of the area of the West Sacramento Freeway.

Mr. Wulff: It certainly appears to be. I just glanced at it.

Mr. Miller: Do you have any objection to admitting it, Mr. Wulff?

Mr. Wulff: It doesn't show where the corrals are situated. That is what I don't understand.

The Court: You can put them in on the map, can't you?

Mr. Miller: We have another map, your Honor, an official United States government map that shows the location of the corrals.

Mr. Wulff: I suggest the Court look at this and if this will serve your purpose I have no objection to it, your Honor.

The Court: Let that highway map be marked Plaintiff's [160] Exhibit 14.

(Testimony of George Houck.)

(The map referred to was marked Plaintiff's Exhibit No. 14 for identification.)

Q. (By Mr. Miller): Mr. Houck, I show you Plaintiff's Exhibit No. 14, which is a plan and profile of the State Highway in Yolo County, showing the Tower Bridge leading out to the Park Boulevard Overpass. Do you recognize this as a presentation of the routing of the highway in that area?

A. I do.

Q. And for the record I would like to mark first of all the approximate place where the accident occurred. Will you mark it with an X?

Mr. Wulff: Just a second. I think you better tell the witness how many feet on the ground is represented in inches on the map so he will have some idea.

Mr. Miller: All right. There is a scale right at the bottom of the map. There is a rule available?

The Court: Well, may I suggest something before you do that. In looking at that map I don't find any of the terms on there that have previously been used by Mr. Houck as describing the overpasses and underpasses. I think they'd better be marked and numbered so we can co-ordinate them on the map.

Mr. Miller: All right, your Honor.

Q. First of all, I would like you to indicate—I believe you [161] referred yesterday to a Riske Overpass? A. Yes.

Q. Do you find Riske Lane Overpass on this map? A. This is it.

Q. And in about the center of the map we have

(Testimony of George Houck.)

what is called the West Capitol Avenue Ramp Overcrossing. Is that what you mean by the Riske Lane Overpass? A. That is right.

Q. Now, will you make that with an X and I will place opposite it "Riske Overpass, and H-1" (marking on map).

Now, closer to Sacramento we have what is called the West Sacramento Underpass. I believe, if I am not mistaken, yesterday you referred to that as the railroad overpass, isn't that correct?

A. I believe that is the term I used. I am not sure.

Q. All right. We will call this "Railroad" and mark that "H-2" (marking on exhibit), and will you place an X at the location of that overpass?

A. (Witness marks on exhibit.)

Q. Now, we have discussed from time to time the Park Boulevard Overpass. Will you mark that with an X? A. (Witness marks on exhibit.)

Q. All right, we will write next to that "Park Boulevard Overpass" and put "H-3" there (marking on exhibit).

Now, will you indicate with an X the point where the [162] accident involving Mr. Grigg's car occurred.

A. Well, this is approximate, too. It is somewhere close to here (marking).

Q. We will mark that H-4 (marking on exhibit).

Now, sir, you spoke yesterday about having placed a flare out. Will you mark the point on the map where the flare was placed out?

(Testimony of George Houck.)

A. This is prior to the accident?

Q. Prior to the accident.

A. (Witness marks on exhibit.) It is approximately right there.

Q. All right. We will mark that H——

A. It would be on the other side of the ditch. You see, I put it right on the ditch. It is east of—or west of the ditch.

Q. All right, we will make another X and will draw a circle around the old X. We will mark this as “H-5” and write “Flare” beside it (marking on exhibit).

All right. Now, sir, can you point out the place on the map where the animals which had been herded together were located?

A. They were located right in back of this ditch, and there is a fence, Riske Lane—it is Cal Central, now, trucking company’s fence is right there, and they were in between the ditch and the fence. [163]

Q. All right, will you place an X to show the approximate location?

A. (Witness marks on exhibit.)

Q. I will mark this “H-6” and I will write beside it “Mules” (marking on exhibit).

All right, sir, you stated that while you were down near where the mules were located, the herd of mules, that you saw some mules going across the Park Boulevard Overpass.

Mr. Wulff: No, he said he saw some mules on the highway.

Q. (By Mr. Miller): On the highway. Now,

(Testimony of George Houck.)

can you show me approximately where you were when you saw these mules?

A. I would have been right here. I was on the north shoulder (indicating).

Q. All right, we will mark this "H-7" (marking on exhibit). And where were these mules at the time you saw them?

A. Well, approximately at the location of where the accident occurred.

Q. Approximately at H-4?

A. That is correct.

Q. All right, sir. Now, there was some talk yesterday about the mules being corralled at the location H-6. Now, I would like to clear that point up. Was there any corral built there?

A. There was not. There was only trees and the ditch itself and the fence on the north side that penned the animals up, so to speak. [164]

Q. And this was not the same location as the Broderick corral, was it, sir?

A. No, it was not.

Q. Now, the Broderick corral is not shown on this map, but can you show me in which direction the Broderick corral would be from the freeway?

A. It would be somewhere over in here (indicating).

Mr. Wulff: Do you know the street address?

A. No, I do not.

Q. You don't know whether it is on Fifth Street, Sixth Street, or what?

A. I know it isn't on Fifth Street. G Street, I believe, is the first one. It is around about four or

(Testimony of George Houck.)

five blocks and then it is west of there about three-quarters of a mile or so.

Q. (By Mr. Miller): All right. Now, will you place an arrow showing the approximate direction of the Broderick corral from the freeway?

A. This would be guessing (marking on exhibit).

Q. All right. I will write beside this, "Direction of Broderick corral," and I will write beside it "H-8" (marking on exhibit).

The Court: Well, he is referring to Broderick corral. That is a new term.

Mr. Miller: The S.P. corral, your Honor, is what we mean by that. [165]

The Court: Well, we were talking about the Washington yards yesterday, or something like that, and now we are talking about a Broderick corral this morning.

Mr. Miller: All right. I will also add "S.P. Broderick Corral."

Mr. Wulff: May I make a suggestion? In railroad parlance Washington Corral is the name they use.

Mr. Miller: Thank you. I think we ought to use that term for the corral.

The Court: Well, let's stick to the standard term. If that is the correct name of it, let's use "Washington Corral" all the way through.

Mr. Miller: All right. I will strike out "S.P. Broderick Corral" and write in "Washington Corral" (marking on exhibit).

Approximately how far—as nearly as you can

(Testimony of George Houck.)

guess, sir, approximately how far would you say the Broderick Corral is from the West Sacramento Freeway?

Mr. Wulff: Just before he answers that question: I know the address of the corral; that may help the officer there.

Mr. Miller: All right, will you give the officer that?

Mr. Wulff: It is Fifth and E.

A. Fifth and E?

Mr. Wulff: Yes.

A. I can't see how it could be on Fifth.

Mr. Wulff: That is the address, sir. [166]

A. If you will excuse me——

Mr. Miller: I have the address as 7th and E.

Mr. Wulff: I just asked the man in charge and he said it is Fifth and E.

A. I might say I have been out there, Mr. Wulff, and I understand the address to be 7th and E in Broderick, and that fits my observation.

The Court: I think we could save a whole lot of all this palaver here if we had a map showing where that corral is located. That is what I have been talking about for almost 24 hours. It is a cinch the corral doesn't move around from one day to the next.

Mr. Robertson: We have another map which will show the exact area of the corral.

The Court: All right then, let's not waste any more time on whether it is Fifth and E or 7th and E or X, Y or Z.

(Testimony of George Houck.)

Q. (By Mr. Miller): Now, have you driven along over the, let's say, the Park Boulevard Overpass at night, sir? A. I have.

Q. And can you tell me whether or not it is possible in conditions of darkness to see down into this draw at the point marked "H-4"?

A. Which side of the draw are you talking about there?

Q. Do your headlights light up the draw between the eastbound and westbound lane at that time? [167]

A. No, they do not. You mean approaching in a car?

Q. Yes.

A. No. You are going up a hill, so to speak, and it would be impossible for your lights to shine below.

Q. Approximately how far is it from the scene of the accident to the Washington Street Corral?

Mr. Wulff: Just a second, your Honor, I object to this—the witness doesn't know where it is and how can he tell how far away it is if he doesn't know where it is?

A. If you will pardon me, sir, I said I knew where the Broderick corral was.

The Court: We are not talking about any Broderick corral. We are talking about the Washington Corral.

A. The Washington Corral, I didn't say I knew where it was located.

(Testimony of George Houck.)

The Court: Well, if you can answer the question, answer it. I don't want any guesses, though.

A. As the crow flies it is approximately a mile. If you take the road, it is approximately a little longer.

Mr. Miller: Thank you, Mr. Houck.

The Court: Any questions, Mr. Wulff?

Mr. Wulff: Yes, just one. May we have that map, please?

Recross-Examination

By Mr. Wulff:

Q. From H-4, Officer, to point H-5, going down the easterly lane and going east, isn't that down a hill? [168]

A. That is correct.

Mr. Wulff: That is all.

Mr. Diepenbrock: I think you have got the wrong spot there. It should be H-3 to H-4.

Mr. Wulff: I beg your pardon, I guess you are right.

Q. Now, going from H-3 to H-4 on the same lane, is that down hill?

A. Where is H-3?

Q. Going east now.

A. Part of it is down hill.

Q. Isn't this the apex of the hill right there where the Parkway is?

A. That is correct, but it is level for a short distance beyond there.

Q. How many feet is it level?

A. I am not certain. I should imagine 50 to a hundred feet.

(Testimony of George Houck.)

Q. And then it is down hill?

A. That is correct.

Mr. Wulff: That is all.

Redirect Examination

By Mr. Miller:

Q. Is that a gentle or a steep slope?

A. It is a gentle slope, not abrupt.

Q. Now, one thing I should have cleared up before: Would you trace the path which you followed from the time you saw the mules up to point H-4 until you got there, how did you travel? [169] You left that point H-7?

A. That is correct. Took the cut-off and went over Riske Overpass, back to West Capitol Avenue, down West Capitol Avenue, what we called yesterday Park Boulevard; it is on here Jefferson Boulevard; and to the turn that takes you back onto U.S. 40.

Q. I think we should mark this point where you came back on U.S. 40. Will you make an X at the point where you came back on U.S. 40?

A. It was right at this point (marking).

Q. We will put this as "H-9" (marking on exhibit).

And where did you go from there? Did you go to point H-4 from point H-9? A. I did.

Q. And is that against the traffic?

A. That is going the wrong way on that section of the highway.

(Testimony of George Houck.)

Q. All right. May I ask you this, sir: When you got up to point H-4, could you see the flare that you put out on point H-5?

A. I didn't look for it, but I am quite certain you couldn't see it.

The Court: You would or wouldn't?

A. Could not.

Q. (By Mr. Miller): That flare was not on the highway, was it, sir?

A. It was not. It was 40 or 50 feet from the highway and in [170] the shrubs—not shrubs, but weeds at the time.

Mr. Miller: Thank you, Mr. Houck.

Recross-Examination

By Mr. Wulff:

Q. One question here on the map, I think you might establish one point. May I see the map temporarily? I believe you said—correct me if I am in error—you said you were standing at H-7, I think? Take a look and see if I have got that correct?

A. That is correct.

Q. Now, where was your car when you were standing at H-7?

A. It was right there.

Q. Was that on the highway?

A. That is correct, it was on the shoulder.

Q. It was on the shoulder of the freeway?

A. On the shoulder of the freeway.

Q. And I assume when you stopped there you put your red blinker light on?

(Testimony of George Houck.)

A. As I say, it is my usual habit to put it on when there is danger impending.

Q. And parked along the shoulder it is a sufficient danger, is it not? A. Oh, no.

Q. You don't think so? A. No.

Q. How wide is the shoulder there? [171]

A. It is just a matter of policy. As a matter of fact, they suggest we don't use it any more.

Q. I am just concerned now in December, 1954. Will you tell us whether or not your best recollection is that the red blinker on the rear of your car was on? I assume you were facing east with your car?

A. I believe it was on, but as I say, I couldn't just come up and say it was on.

Q. In other words, it is your best recollection it was on?

Mr. Miller: I object——

A. It was my usual habit to put it on under those circumstances.

Mr. Wulff: The question has been answered, your Honor.

The Court: Overruled.

Redirect Examination

By Mr. Miller:

Q. In which direction would that red light be pointing in? A. It would be shining west.

Q. Now, sir, you are not positive as to whether it was on or off, are you?

(Testimony of George Houck.)

A. I am almost positive. I just can't come out and say it was on, period.

Q. You weren't there when this accident happened, were you? In other words, you had left part of the time this accident happened, had you not?

A. That is correct. I made the circuit during the time the [172] accident happened.

Q. So there was no car at that point and no red light blinking at the time the accident happened, was there?

A. When I got in the car, no accident had happened at that time, and I left immediately and it took me about ten seconds to get off the freeway.

Mr. Miller: All right, thank you very much.

Recross-Examination

By Mr. Wulff:

Q. Just a minute, please. When you arrived at the point of the accident, the accident had already occurred?

A. That is correct.

Q. You didn't see the accident occur, did you?

A. No, sir.

Q. Therefore you don't know when it occurred?

A. No, sir.

Mr. Wulff: That is all.

Mr. Miller: That is all, Mr. Houck. Thank you very much.

The Court: Just a moment, Mr. Houck. Mr. Houck, if I understood you correctly yesterday, you testified that at the time and place where this acci-

(Testimony of George Houck.)

dent occurred, it is your opinion that a speed of 65 miles an hour would not have been an unreasonable speed.

A. That was taking into consideration certain circumstances.

Q. Well, is that what you said yesterday?

A. No, sir. I added in there if the driver was competent [173] that 65 would have been reasonable.

Q. Then at the time and place of the accident, the driver being competent, 65 miles an hour, in your opinion, would not have been an unreasonable speed?

A. That is correct.

Q. Now, what circumstances did you take into consideration in fixing that speed, Mr. Houck? Let us first talk about the road itself. What condition of the road did you assume at that time?

A. The road was dry at that time.

Q. Well, in arriving at your opinion, what condition of the road did you assume?

A. That it was dry, the roadway itself was in good condition; it is a freeway, we take that into consideration, two lanes going in the same direction.

Q. All right. Was it straight or curved at that point?

A. There is a slight curve, that is correct.

Q. You took that into consideration?

A. That is correct, sir.

Q. And did you, in arriving at your conclusion, conclude that in making that curve the lights might not be shining directly upon the highway?

(Testimony of George Houck.)

A. Yes.

Q. Incidentally, as you come east there on that, what direction is the curve, to the right or to the left? [174]

A. It is a sweeping turn to the left.

Q. A sweeping turn to the left?

A. That is right.

Q. Now, as you were coming around there where would that throw your lights of the automobile?

A. They would be mostly on the highway.

Q. Well, the part that was on the highway, would it be in the right-hand lane—I mean on the right-hand shoulder or the left-hand shoulder?

A. It would be on the right, of course. Of course, that isn't the fastest lane. There might be other automobiles obstructing that.

Q. All right. Now then, I understood you to say that there was an elevation there at what would be referred to as the Park Boulevard Overpass, and that that elevation is such that you can't see ahead of you on the road.

A. If I made that statement, I didn't mean it. You can't be—the distance isn't unlimited in making a turn like it is, when you are on a straight-away.

Q. What do you mean, that the distance isn't unlimited? Isn't that just another way of saying that you can't see the road ahead of you a part of the time there?

A. That is right, yes.

Q. Now——

A. What I am saying is that you can't see the

(Testimony of George Houck.)

complete distance [175] that you could on a straight-away, because the road does turn.

Q. As you come up over the overpass here, how much of the highway is obstructed to you as you are coming up that overpass?

A. The highway that is beyond you?

Q. Yes.

A. That is a little difficult to say. As I say, I have passed over it many times and the distance that you can see is a considerable distance.

Q. Well, let me ask you this: As you come over that overpass there, is there any part of the highway that is completely obstructed to your view? That is, if there was a pedestrian or a horse or an automobile ahead of you there, you couldn't see it?

A. It would be quite a distance there.

Q. That you couldn't see them? A. Yes.

Q. What do you mean by quite a distance?

A. Well, you have to take into consideration the complete rise in the roadway there that starts back about, I don't know, probably a half a mile to three-quarters of a mile, and from that distance you can't see over the top. You can see the roadway on the side, because it sweeps into where you can look, but as you actually approach the Park Overpass, [176] just immediately on the other side you couldn't see for a half a mile back, probably, maybe a quarter of a mile.

Q. In any event, there is a blind spot in the road as you come up over the Park Overpass?

(Testimony of George Houck.)

A. No, I wouldn't say there is a blind spot, your Honor.

Q. Then are you telling me that you can see the road all the way as you come up over the overpass?

A. In the daytime you have a very good view of most of the road at all times.

Q. I am not talking about most of the road. I want to know as you come up over the Park Overpass in broad daylight is there ever a time when you can't see the entire road ahead of you?

A. There is.

Q. All right. Then there is a blind spot in there, isn't there, a spot where you are blind as far as the highway is concerned?

A. Yes, putting it that way, that would be so.

Q. Well, now, that covers pretty much the highway. What was the condition as to whether or not it was light or dark at the time the accident happened?

A. It was dark.

Q. Will you tell us what does the California Vehicle Code say with reference to driving your car after dark, about how fast you should drive it?

A. I don't believe there is a thing in there that has reference to your speed in the night time that I know of. [177]

Q. Isn't there a section of the California Vehicle Code which says you must have your car under such control that you can stop within the distance that you can see in the beams of your lights?

A. I thought it was covered by Section 510 that

(Testimony of George Houck.)

says, "Reasonable and prudent," or something to that effect.

Q. But isn't there another section that says you must at all times drive so you can stop within the visibility that you can see at the time?

Mr. Robertson: Your Honor, I think that an examination of the laws of the State of California and the court decisions will show that there is no requirement that a driver of a car be able to stop in the distance of his headlights at night, and I can cite authorities on that point.

The Court: Well, do you mind if I examine the witness?

Mr. Robertson: I beg your pardon.

The Court: He made a statement yesterday and I want to get the basis for his statement on the matter.

Q. Is that your position then, that there is no requirement that you have your car in such control that you can stop within the visibility that is available to you? A. No, sir.

Q. You don't have to have your car in control to be able to stop in that distance?

A. You mean you don't have to have your car under control [178] within the distance of the lights?

Q. I didn't say that. Is it your position that you don't have to have your car under such control as to speed as to be able to stop within the visibility that is in front of you as you proceed down the

(Testimony of George Houck.)

highway? I am thinking of fog or night or anything else that obstructs your view.

A. I am still not quite clear on that, your Honor. Are you referring to the distance that you can see by the headlights?

Q. I don't care whether you can see by the headlights or what. If it were a foggy night and you couldn't see but ten feet in front of your car, would you say that it was safe to drive your car 65 miles an hour down the road? A. No, sir.

Q. Well, how fast could you drive under those circumstances?

A. Well, it would be a rather slow speed if you could only see ten feet in front of you. It would probably be better to get off the road.

Q. I am talking about ten feet in front of the bumper.

A. Yes. Well, if the fog was that bad, it is best to get off the road, there is no question about it. The danger is there regardless of what speed you are going. There is considerable danger.

Q. Well, then, let's come back to the original proposition. Did you take into consideration when you estimated the speed of 65 miles an hour that it was dark, in this case? [179] A. I did.

Q. Now then, how about a vehicle coming up over a rise where you can't see the road in front of you?

A. There is nothing in the Vehicle Code that I know of concerning a four-lane highway, two lanes going in the same direction.

(Testimony of George Houck.)

Q. Well, then, on that basis, do I understand it is your position that you can drive as fast as you want to if you come to a rise where you can't see ahead of you?

A. No, that would limit your speed, there is no question about that. But as I say, that is a long sweeping area.

Q. But you just told me that for at least a quarter of a mile before you come to the overpass there you can't see the highway.

A. That is correct, but a quarter of a mile is over a thousand feet.

Q. 1,320 feet, if you want to count them.

A. Which is a considerable distance to stop in at 65, or when there is no hazard there.

Q. Yes, but what would happen when you came over this rise here and there was an accident?

A. Oh, the roadway is revealed before you come within what would be a dangerous distance. At 65, sir, you can stop in 300 feet without any difficulty at all, especially in a brand new car with power brakes. [180]

Q. That isn't the point I am getting at. Where is the place that you can see everything down the road? Maybe I don't understand this thing. Where do you reach the place where you can see everything down the road that is ahead of you?

A. At the top.

Q. Right at the top. Well, let's back up on that. Suppose there is an accident 50 feet beyond the top?

(Testimony of George Houck.)

A. You could see it in plenty of time.

Q. In other words, you could stop in 50 feet?

A. No; oh, no. You would recognize the danger long before that.

Q. How would you recognize a danger if you can't see the road?

A. I said you could see the road for approximately a thousand feet back.

Q. I can't for the life of me understand what you are telling me. First you tell me that there is a quarter of a mile before you come to this overpass that the highway in front of you is blind.

A. No, I beg your pardon. A quarter of a mile back, a part of the highway would be obscured. As you proceed along this quarter of a mile, the rest of the roadway is revealed.

Q. Do I understand there is no obstruction at that overpass?

A. There is no obstruction. [181]

Q. You are telling me that from a quarter of a mile before the overpass you can see the entire highway?

A. No, that is where you can't see the entire highway.

Q. That is what I just said about two minutes ago, that there is a blind spot in that quarter of a mile there and you said no, you can see the highway.

A. Beyond me—at approximately a quarter of a mile back as you look down the highway over the peak, that would be obscured somewhat. As you proceed along this quarter of a mile, it is revealed.

(Testimony of George Houck.)

The vision continues with proceeding in the automobile.

Q. Well, in that quarter of a mile, 1320 feet, if you want to call it that, prior to the crest of the overpass there, you can see the full highway as you proceed down it, is that it? I am thinking about that eastbound lane and nothing else.

A. That is understandable, your Honor, but that is—that is getting down to fine points. As I say, I travel it quite often.

Q. Mr. Houck, it was you and not I that suggested that 65 miles an hour was a reasonable and prudent speed there, and it may of some very great importance in this case here, and I want to know why you fix that speed.

A. You want me to narrate my reasons?

Q. Yes, if you can give me your reasons why, I would like to know what they are. [182]

A. Well, at night time in a new car with power brakes, with excellent headlights and with a competent driver, on the freeway, when there is no rain or fog, and the fog at that time was not to the point where it had settled in over the freeway, under those conditions and over Park Boulevard Overpass there, even, 65 in my opinion is a reasonable speed, because no one expects someone to dart right out immediately in front of you, which is impossible to miss under any circumstances.

Q. Well, you say no one expects you to dart out there. Suppose there is an accident there on the highway there.

(Testimony of George Houck.)

A. By that time you would be prepared for it. You could see it.

Q. In other words, you can see the highway?

A. Yes, you can see—let me put it this way, your Honor, you can see enough of the highway to go along at 65 miles an hour and not produce any dangerous element.

Q. How rapidly do you anticipate that the average driver can stop his vehicle?

A. You mean going at 65?

Q. No, at any speed. What is the reaction time?

A. Oh, the reaction time, I understand, is a matter of three-quarters of a second.

Q. And at 65 miles an hour, using the rule of thumb, how fast does a vehicle travel? [183]

A. Those figures elude me, your Honor.

Q. It is one and a half times the speed plus three, isn't it? A. I don't know.

Q. In other words, if you are going 65 miles an hour down the road, it is 97 and a half feet plus three—it would be one hundred and a half feet per second?

A. Yes, plus the reaction time. It is still within three or four hundred feet. I mean, you can stop the whole procedure.

Q. What I am doing is just getting your reasons for—I take it that you have not considered that, not knowing those facts, you have not taken those into consideration.

A. I took those into consideration, your Honor.

(Testimony of George Houck.)

We are assuming that your stopping distance is approximately 400 feet under any kind of circumstances. That is the human element of reaction time, plus the fact that the automobile can't stop within more than a certain distance. That we will say at 65 is within 400 feet. But the visibility on the road is considerably more than 400 feet.

Q. Even out there in the dark it is more than 400 feet?

A. A car with adequate headlights.

Q. Now, getting back to what I wanted: If you are driving down that road there over that overpass, with adequate headlights, you could see down the road and see anything on it that was 400 feet ahead of you? [184]

A. Oh, yes, yes, that is my opinion.

Q. (By Mr. Miller): Can you state whether or not there are fences running alongside there of that freeway?

A. There are.

Q. And for what purpose have those fences been placed there?

A. To keep animals and people out, even.

Q. Ordinarily is there any animal traffic or human traffic across that freeway?

A. Ordinarily not.

Mr. Miller: Thank you, Mr. Houck.

Mr. Wulff: No questions.

Q. (By the Court): Those fences don't keep people and animals out of there, do they?

A. No, there are openings.

Q. Certainly. Then in other words, any indis-

(Testimony of George Houck.)

creet person or any dumb animal could get on that highway any time they wanted to, couldn't they?

A. Oh, yes.

Q. So you have got fences on two sides of a field and the other two ends are open, isn't that what the situation is?

A. Well, that is correct. They have to find the openings to get onto the freeway, and those openings are at a distance apart.

Q. Well, it is a field with two sides fenced and the other two ends are open? [185]

A. That is correct.

The Court: Anything else?

Mr. Miller: No, your Honor.

Mr. Wulff: No further questions.

The Court: That is all, Mr. Houck. Thank you.

Mr. Miller: May the officer be excused now, your Honor?

The Court: Unless there is objection, he may be excused.

Mr. Wulff: No objection.

Mr. Miller: Mr. Spansel, please.

MALVERNE P. SPANSEL

called as a witness on behalf of the plaintiff, Sworn:

Direct Examination

By Mr. Miller:

Q. Mr. Spansel, on December 17th of 1954, where did you live?

A. 5534 Alameda Avenue in Richmond.

(Testimony of Malverne P. Spansel.)

Q. And where do you live now?

A. Route 2, Box 415 F, Auburn.

Q. What is your occupation?

A. At the present time I am employed by the Yuba River Lumber Company as a contact man, outside salesman.

Q. And back in December 17th of 1954, sir, what was your occupation at that time?

A. I was retired from the Post Office Department.

Q. And how far back did you work for the Post Office Department?

A. Well, since 1930, 23 years. [186]

Q. Now, in December of 1954, you were, were you not, building a house for yourself up where you presently live?

A. That's right.

Q. And on that evening can you tell me where you were going?

A. I was going to the ranch.

Q. And from what point had you left?

A. Richmond.

Q. And at approximately what time did you leave Richmond?

A. As near as I can remember it was approximately a quarter after four when we left the Standard Service Station just east of Richmond.

Q. And, sir, during that period, you traveled quite frequently from Richmond to Auburn and Grass Valley, did you not?

A. Yes, sir. We made that trip every week end

(Testimony of Malverne P. Spansel.)

for—since about 1950, approximately three years, two and a half years.

Q. And what route did you travel?

A. I traveled 40 into Sacramento, that is to the west end of what we call the Tower Bridge, and then swung left and went through Broderick over the I Street Bridge, up Gibboom Street and straight through North Sacramento, or whichever route seemed to be the best at the time.

Q. And is it fair to say, sir, that is the route you followed on every trip you made?

A. Yes.

Q. And how frequently did you make these trips? [187]

A. Every week for approximately two years and a half, somewhere in that neighborhood.

Q. Can you tell me what your driving time was from Richmond to the Tower Bridge?

A. We checked it many times, from Richmond to the ranch is approximately three hours and a half.

Mr. Wulff: Just a moment. I object to what he was doing on other occasions except the occasion of this evening.

The Court: The objection will be sustained.

Q. (By Mr. Miller): Can you tell me how long it took you the evening of the 17th to drive from Richmond to the point where the accident occurred?

A. Approximately two hours.

Q. And from that approximately what time would you state the accident occurred?

(Testimony of Malverne P. Spansel.)

A. Shortly after 6:00 o'clock.

Q. Now, sir, were you traveling—from what you said it is fair to assume you had crossed the causeway and you were traveling over what is known as the West Sacramento Freeway?

A. Between the causeway and the bridge, yes.

Q. And that is the new freeway. What kind of an automobile were you driving?

A. 1950 three-quarter-ton Ford pickup.

Q. And can you tell me whether or not you had gassed up on leaving Richmond? [188]

A. I did.

Q. And had you had your windshield cleaned at that time? A. As always.

Q. And at the time you came onto the freeway was your windshield clean?

A. To the best of my knowledge.

Q. Who was with you in the pickup truck, if anyone? A. My wife.

Q. You had a dog with you, too, did you not?

A. Yes.

Q. Now, at the time that you were coming off of the Yolo Causeway, at what speed were you traveling?

A. 45. That is the speed limit on the causeway.

Q. Did you notice any other automobiles in particular about that time?

A. Shortly after we left the causeway, I should say, oh, within a couple of hundred feet, a Cadillac pulled up beside us. We were in the right lane, he was in the left lane, the passing lane.

(Testimony of Malverne P. Spansel.)

Q. This was a Cadillac of a later range, it was new?

A. Yes.

Q. And was it anything special that you noticed about this Cadillac?

A. Well, the fact that it was new and the fact that we couldn't afford one, and it passed us very slowly, so I speeded up to [189] keep it in the headlights because the wife was admiring it, and we traveled that way for, I don't know how far, some distance, and then I eased up a little bit and let it crawl away from us.

Q. Now, at the time you speeded up and held the same speed as the Cadillac, how fast were you traveling?

A. I picked up to approximately 50 miles an hour, I remember watching that, and as I held it at 50 miles an hour the Cadillac slowly drew away, very slowly.

Q. And what would you estimate the Cadillac's speed to be at that point?

Mr. Wulff: What point are you talking about?

Q. (By Mr. Miller): At the point the Cadillac begin to pull away from you. You said you slowed down——

A. Well, anywhere in the neighborhood of 5 miles an hour he was moving away from us, I would say.

Q. And how fast were you moving at that time?

A. 50 miles an hour, to the best of my recollection.

(Testimony of Malverne P. Spansel.)

Q. From that what would you estimate the speed of the Cadillac?

A. I would say in the neighborhood of 55. Not too much above 55.

Q. Now, sir, can you state what the visibility conditions were at that time?

A. The visibility conditions were good as far as weather was concerned. It was dark at that time in December. There [190] was no fog and we could see the headlights of the cars in the other lanes and down below, we could see the lights in the city ahead of us.

Q. All right, sir. Now, can you tell me what happened as you approached what has been called here the Park Boulevard Overpass? Are you familiar with that overpass?

A. Well, if you will pardon me for saying this, please, this overpass—I mean the discussion about this overpass confuses me somewhat. I personally from my point of view can see no bearing the overpass would have, because when we were involved with this business that occurred, we were past the overpass.

Q. You had just come up over the overpass?

A. We had come up over the overpass, yes.

Q. All right. Will you tell me what occurred then?

A. Well, as I say——

Q. First of all, where was Mr. Grigg's car in relation to your car?

A. He was in the left-hand lane.

Q. And how far away from you?

(Testimony of Malverne P. Spansel.)

A. Well, at the moment of his impact, I didn't know at the moment what had happened, but I could see that something had happened—from the moment of his impact to my stopping, considering the fact that I also struck an animal, I stopped with the cab at approximately a 45-degree angle to the rear of the Cadillac. So that is how far ahead of me he was. I wouldn't [191] care to estimate it in feet. Maybe 100 feet, 150 feet, somewhere along there.

Q. He was close enough so that you could see the Cadillac quite well?

A. Oh, yes. May I describe what I saw, what happened?

Q. Yes, please describe what you saw happen.

A. Well, as I stated, the road ahead of us was clear as far as I could tell, with the exception of this one car. All of a sudden his lights flew up in the air, as it were, and went out, and the car swerved with the rear end toward the center of the road. Immediately I expected—not knowing what had happened—that he would come into my lane, so I sat down on everything in front of me, and as I did an animal came out of the dark from the left on a dead run and I struck him, and as I came to rest, I was practically alongside of the Cadillac.

Q. Was that the first time you saw any animal?

A. That is the first time I saw any animal, and it was just that fleeting glimpse, because it was just on a dead run.

Q. He was running, you say?

A. Yes.

(Testimony of Malverne P. Spansel.)

Q. Now, can you describe to me the course of this animal?

A. Well, it looked as though it was a range animal, it was a dark brown, dirty color. The clearest thing I could see about the animal was his eye, he was looking over his shoulder. [192]

Q. Was there any reflection from his coat from your headlights? A. No.

Q. How would you describe his coat?

A. Well, sort of shaggy and dead in color, it was brown, a dark brown, but there didn't seem to be any reflection like you would get from a polished coat.

Q. In other words, there was no luster——

A. That is right.

Q. ——from the animal at all? A. No.

Q. How many did you see?

A. I saw only one, that is, clearly. There were others—how should I say it—I sensed them at the moment of impact, but it was the only one that I saw clearly.

Q. And what did you do after you came to a halt, sir?

A. I tried to close the doors of the cab, they had swung open in the impact, helped my wife up off the floor, asked her to get out as quickly as possible because there was following traffic and then I got out and looked at the damage to the front of the pickup.

I saw Mr. Grigg on the other side, but I didn't want to go out onto the middle of the road because

(Testimony of Malverne P. Spansel.)

we were blocking it and the traffic was coming up from behind.

My headlights were out, but my tail light was burning, so I knew I was safe there. [193]

So we got off to the side of the road to keep out of the way of traffic as much as possible.

In the meantime another car had come in behind the Cadillac on the left lane, and I have the impression that it bumped him slightly, but he was practically stopped.

It was shortly after that that Officer Houck arrived. This all happened in a very short space of time. It is a little difficult to sort out all the things that I could remember.

Q. Yes. Did you have an opportunity to observe Mr. Grigg's physical condition at that time?

A. To tell you the honest truth, I didn't pay too much attention to Mr. Grigg. I was more worried about us being in the path of the oncoming traffic.

Q. Mr. Grigg was later taken away, was he not?

A. That is what I understand. I don't know that.

Q. All right. You say Mr. Houck came up. About how long after the accident was it when he came up?

A. I would say he was there within five minutes.

Q. Within five minutes of the accident?

A. I would say it was within five minutes.

Q. Now, was anyone there who seemed to have anything to do with these animals?

A. Well, let's see; I don't remember at what

(Testimony of Malverne P. Spansel.)

time, as far as time relation is concerned, but the officer helped us or helped me push the pickup off the road onto the right-hand [194] shoulder so as not to obstruct the traffic, and it was quite cold and windy, and I got back in the cab and closed the door, held it shut, and some tall, slender man in jeans, and I think boots and a black hat, came up and was talking to various people around there. I don't remember that he spoke to me directly, but I think he speak to Officer Houck, and he seemed from what bits of conversation I could overhear to know something about it. Just what, I don't know.

Q. Sir, did you see any other mules in the area later? A. Later?

Q. Yes.

A. Well, to be able to point them out and count them, no, but ahead of us, and this was on a very gentle curve, as I remember, and the road falls away on both sides—that was another reason why it was impossible to miss the animals, and Mr. Grigg was in the left lane, there was a deep declevity on the right, I couldn't hit him and I couldn't go over the shoulder, so I couldn't miss the animal.

Q. You had no alternative?

A. I had no alternative but to go right straight ahead.

Q. Was there any change in Mr. Grigg's tail-light prior to the accident?

A. Oh, no, no. To my mind, the accident, or whatever he struck was the cause of it, because it

(Testimony of Malverne P. Spansel.)

happened now. And the car swerved sideways just as though it had struck something. [195]

Q. And what did you do when you saw a collision involve Mr. Grigg's car?

A. Well, I sat down with everything in front of me. I was afraid he might come into my lane and I wanted to be sure that I would stop in time, and I think I had the time, but immediately as I set the brakes, the other animal was in front of me, and that spoiled the whole thing.

Q. You were still unable to miss hitting the mule?

A. Yes, I couldn't miss him to save my life.

Mr. Miller: Thank you very much, sir.

Cross-Examination

By Mr. Wulff:

Q. Mr. Spansel, you have employed Mr. Charley Miller here to bring suit for you growing out of this particular accident?

A. No, sir, not I. I am not named.

Q. Have you not employed Mr. Miller? Do you understand my question?

A. Yes. I say I am not named. A suit is to be brought, but I am not named.

Q. In other words, you are not bringing it?

A. No, sir.

Q. But it grows out of something relative to your car? A. That is true.

Mr. Wulff: That is all.

Mr. Miller: Mrs. Spansel, will you take the stand, please. [196]

LILLIAN SPANSEL

called as a witness on behalf of the Plaintiff, Sworn:

The Court: Do you expect to prove anything different by Mrs. Spansel than you proved by Mr. Spansel?

Mr. Miller: She had an opportunity to observe some mules that were traveling around in the area after the accident, your Honor.

The Court: Well, what I was about to ask Mr. Wulff, would you stipulate that as far as Mr. Spansel's testimony is concerned, that Mrs. Spansel would testify substantially the same?

Mr. Wulff: Likely so.

Mr. Miller: All right.

The Court: Then will you confine your examination to these extra matters, if that is the stipulation?

Mr. Miller: If it is all right, your Honor, I would like to ask her if her testimony would be substantially the same.

The Court: Well, you could do that if you want to, yes.

Mr. Wulff: I have already stipulated to it. I don't know what it adds.

Mr. Miller: All right, then.

Q. Mrs. Spansel, following the accident, did you have an opportunity to observe any mules in the area? A. Yes, sir, I did.

Q. Will you please tell me what you did observe? [197]

(Testimony of Lillian Spansel.)

A. After the accident there were several rounded up, so to speak, by about, I think, three men, and they were trying to put them over behind the fence on the right-hand side of the road ahead of us just this side of what has been named the Port or Belt line.

Q. Let's see. I will get the map here and I think that might help us.

The Court: Was this after you had moved, Mrs. Spansel, or while you were still there at the scene?

A. We were still there at the scene waiting for some friends to come and pick us up.

Q. (By Mr. Miller): Mrs. Spansel, this is a Department of Public Works map showing the area. To orient you, I will point out that H-4 is the point that has been ascertained where the accident occurred.

A. And this is Sacramento (indicating).

Q. And this is Sacramento here. This at point H-2 here is the point where the railroad crosses the freeway? A. Yes.

Q. Now, can you show me on this map, can you indicate where you saw the mules being rounded up?

A. It seems to me it was right down in this area before you come to the—this is West Capitol Overpass (indicating)?

Q. Well, we called it the Riske Overpass in this trial.

A. Well, it was down in here (indicating). [198]

Q. At the point marked H-6, would you say?

A. Just about.

(Testimony of Lillian Spansel.)

Mr. Miller: All right. I will add that additional mark here on the map.

The Court: Well, if she indicates it is H-6, why, that is all you need.

Mr. Miller: Yes. It is the same area that Mr. Houck spoke of.

Q. Did you see any mules in the area between the two opposing lanes of traffic?

A. No, I can't say that I did.

Q. You saw the dead mules?

A. I saw the dead mules.

Q. You saw two of them? A. Yes, sir.

Q. On the left-hand side of the road?

A. Well, one was to the left of Mr. Grigg's car and one was out right straight out in front of us in the middle lane.

Q. All right. A. The white line.

Mr. Miller: Thank you. That is all.

Mr. Wulff: No questions.

Q. (By The Court): Mrs. Spansel, you were there at the scene of the accident and you say that you could see three men rounding up some animals down at what has been marked as H-6 [199] on this map?

A. When we were waiting for this friend of ours to come after us, we were walking around trying to regain our composure, myself and my dog.

Q. Well, did you walk up the road from there?

A. I walked down on the right-hand side of the road and back the same way to our truck, and kept walking back and forth.

(Testimony of Lillian Spansel.)

Q. How far down the road did you go?

A. Not too far, but you could see the people down there.

Q. Well, did you go the length of this room?

A. Farther than that. Twice, I would say.

Q. Twice the length of the room, and it was while you were walking there that you could see down there at this that is marked "West Capitol Avenue Ramp or Crossing" and that has been referred to by the officer as the Riske Overpass, and they were down to the right-hand side?

A. Down to the right-hand side and there was a little side street that came into the—the merging traffic came into Highway 40.

Q. Did you see a red flare down there at that time?

A. No, sir, I did not.

Q. How far beyond the Park Boulevard Overpass would you say it was where the accident happened?

A. That I couldn't say, not remembering where the overpass is.

The Court: That is all. [200]

Mr. Miller: Thank you very much.

Mr. Wulff: That is all.

Mr. Miller: I would like to call Mr. Courtney to the stand.

The Court: We will take the morning recess at this time.

(Recess.)

Mr. Miller: Mr. Courtney, will you take the stand, please?

DON COURTNEY

called as a witness on behalf of the Plaintiff, Sworn.

Direct Examination

By Mr. Miller:

Q. Where do you live, Mr. Courtney?

A. 700 F Street, Broderick.

Q. Will you please describe where your house is in relation to the Washington Corral?

A. Well, I own property right across the street from it, but I live down on F Street, and it is on E.

Q. You live about a block from the property?

A. Yes.

Q. And how long have you lived at 700 F Street in Broderick?

A. Three years.

Q. And has the corral been there all that time?

A. Yes.

Q. You are acquainted with Mr. H. L. Coons, are you not, sir?

A. Yes, sir.

Q. And can you tell me what business Mr. Coons was in? [201]

A. He was in the stock business, shipping stock from Texas and Arkansas out here to Sacramento.

Q. And, sir, what business are you in?

A. I am in the stock business. I have cattle and horses, also.

Q. And how long have you been in that business?

A. Ten years.

Q. Are you familiar with the habits and inclina-

(Testimony of Don Courtney.)

tions of horses and mules, the handling of horses and mules? A. Well, pretty well.

Q. Sir, can you tell me—I will put it this way; let's go back to December 16, of 1954, can you tell me whether or not Mr. Coons brought some horses and mules to the Washington Corral on that day?

A. Yes, he shipped two carloads in.

Q. And were you there at the time they were unloaded?

A. No, shortly afterwards. I saw them right after they were unloaded.

Q. And you saw Mr. Coons shortly after that?

A. Yes.

Q. And that was what time of day?

A. Oh, I imagine 10:30 or 11:00 o'clock, something like that.

Q. In the morning or evening?

A. That was in the morning.

Q. Where were the horses and mules at that time? [202]

A. In the S. P. stockyards.

Q. And can you tell me whether or not the gates were closed at that time?

A. Yes, they were.

Q. And how were the gates closed? In other words, how do you close those gates?

A. Well, they swing around with a latch.

Q. What kind of a latch?

A. It is a little latch to work with your finger.

Q. A sliding wooden board? A. Yes.

Q. Can you tell me whether or not, to the best

(Testimony of Don Courtney.)

of your recollection, there were any locks or chains upon those gates?

Mr. Wulff: If your Honor please, that is immaterial and incompetent. There is no evidence that the horses escaped from the corral and no obligation for the Southern Pacific Company to supply locks. The carloads had already arrived in Sacramento and he took over possession of the carloads.

The Court: In the interest of saving time, I am going to hear the evidence, but it will depend entirely upon who was responsible for the animals.

Mr. Miller: Your Honor, I was going to point out that there is an admission on file that the animals escaped from the corral, Plaintiff's Exhibit No. 11.

Q. Mr. Courtney, did Mr. Coons ask for the use of your pickup [203] truck on that day?

A. No, it was on a prior day.

Q. A prior day? A. Yes.

Q. Was this before the mules arrived?

A. No, the day after they arrived.

Q. And that would be the 17th?

A. Well——

Q. The same day as the accident?

A. Yes.

Q. And did Mr. Coons ask you for the use of your truck on that day?

A. He wanted to know if he could use my truck and if I would help him feed, and I helped him feed. I drove the truck myself.

(Testimony of Don Courtney.)

Q. You went to pick up a load of feed?

A. Yes—well, he had it all ready, right there by the S. P. corrals.

Q. And what kind of a truck did you have?

A. A GMC.

Q. You picked up some feed in the truck and took it to the corral?

A. No, outside the corral.

Q. You didn't take the feed to the corral itself?

A. No.

Q. You dumped it outside the corral? [204]

A. Yes.

Q. How far from the corral fences themselves?

A. Well, the nothern side of the corral was a part of the enclosure they were in, but they were on the outside of the S. P. stockyard in another little vacant lot they have there.

Q. Did you bring the animals outside to feed them then?

A. They were there when I fed them, yes. They were already let out.

Q. Why were the animals fed on the outside of the corral instead of inside?

Mr. Wulff: I object to that, if your Honor please——

The Court: Sustained.

Q. (By Mr. Miller): Can you tell me what the condition of the inside of the corral was at that time?

A. Well, they were a little muddy and it was handier to feed them outside.

(Testimony of Don Courtney.)

Q. How deep was the mud?

A. Oh, in the winter time I would say it varied from, oh, maybe eight inches to ten inches.

Q. Sir, from your experience, how many mules and horses were there outside this corral?

A. They were all of them. I would say 50 head or 55.

Q. And, sir, in your experience, is one man capable of controlling 50 or 60 horses and mules?

Mr. Wulff: If your Honor please, that calls for a conclusion [205] of the witness.

Mr. Miller: He is an expert, your Honor. He says he has handled them for ten years.

The Court: Well, I don't believe that is a subject for expert testimony. I will sustain the objection. There are too many ifs in the matter.

Q. (By Mr. Miller): Mr. Courtney, adjoining the place where these mules were being fed, is E Street in Broderick, is it not?

A. That is right.

Q. In other words, the open area in which they were being fed is right on E Street?

A. Between 7th and 8th on E.

Q. Between 7th and 8th on E. Now, is there any fence or enclosure between the area where the animals were being fed and the public street?

A. A very poor one.

Q. What?

A. It is a very poor one. They had from one to two wires stretched in the area.

(Testimony of Don Courtney.)

Q. A very poor fence. Would that fence prevent horses or mules from crossing it?

A. No, not if they wanted to get out. It wouldn't.

Q. There was no answer to a question which I asked to which the objection was overruled, and that question was—and this [206] refers to December 16th and 17th—was any lock on the corral?

A. Not that I recall.

Q. A chain and lock?

A. Not that I recall.

Q. Now, sir, where had you been on the day of the 17th?

A. Well, it would be kind of south of Auburn. I had cattle up there and I am sure I was up there feeding that day.

Q. On the day of the 17th did you return to Broderick?

A. It was shortly after dark just as I went to turn down onto 7th Street where I live, there was stock going across the highway.

Q. Horses and mules? A. Yes.

Q. Did you recognize them as Mr. Coons' stock?

A. No, not at the time. I drove up there because I thought maybe they might be mine, because I have a pasture, oh, about three blocks from there, but when I got up there, Mr. Coons was there with him and also a few of the other fellows putting them in, so I didn't even help him, because he had them right there and had enough help to put them in.

Q. They were putting them back into the corrals

(Testimony of Don Courtney.)

at that time? A. Yes.

Q. Sir, that area in which the corrals are located, can you state whether or not that area is frequented by children? [207]

A. Well, yes.

Mr. Wulff: I will object to that, your Honor. It is immaterial and incompetent.

The Court: Sustained.

Mr. Miller: Your Honor, what I want to show, the purpose of this question, is that these particular corrals can be opened by practically anyone, and the witness will testify that this area is more or less of a hang-out for children.

The Court: But the difficulty of your position is that you now have the animals outside of the corral. As I understand it, they are now out in a field where there is a two-wire fence between them and the fence.

Mr. Miller: Well, our position is this, your Honor: we have no eye witnesses who can state exactly how these horses and mules got off of the property of the Southern Pacific and onto the freeway. I think we have to establish it——

The Court: Now, wait a minute now, though, you have taken them out. I don't know who this wire fence the witness has just described belongs to, whether it is a Southern Pacific fence or whether it is somebody else's fence, and whether the gates were open, closed or what in the corral, if they are now taken out in a field where there is a wire fence between them and liberty, what difference does it

(Testimony of Don Courtney.)

make whether the gates were or were not open? This witness, your own witness, said that Mr. Coons had them out and had him help him feeding them [208] in the field there.

Mr. Miller: That was in the morning prior to the accident, your Honor. This particular witness was not there at the time the mules got loose, so he can't say whether the mules were back in the corral or whether they were out in the feeding area surrounded by this wire fence.

The Court: Well, there was some testimony on that, so I am not going to permit this testimony.

Q. (By Mr. Miller): Whose property is that corral located on?

Mr. Wulff: Just a moment. If the man knows. It is hearsay and inadmissible.

The Court: If he knows, he can answer it. If he doesn't know, he can say so.

A. I have always thought it was S.P. property. I could be wrong.

Mr. Wulff: I move to strike that out.

The Court: The answer may go out.

Q. (By Mr. Miller): Did you see those animals back in the corral at any time after you saw them in the morning?

A. No, I left shortly afterwards.

Q. Mr. Courtney, were you acquainted with Mr. Coons business? In other words, the exact manner in which he conducted his business of trading in horses and mules?

A. Not exactly. I knew him quite well and he

(Testimony of Don Courtney.)

used to buy horses and ship them in there, and I am a horse man myself and [209] we got acquainted.

Q. Do you know the procedure he followed in shipping them into Sacramento and shipping them out? A. He shipped several loads——

Mr. Wulff: Just a second. Unless he knows what happened on this occasion, if your Honor please, it would be incompetent and immaterial what he did before. The evidence is that sometimes he diverted them and sometimes he sold them here.

The Court: I know that is what the evidence is. If he knows, he can testify. He can't testify to what somebody told him.

Mr. Miller: Well, he was there——

The Court: Well, I am ruling in your favor now. You'd better leave well enough alone.

Mr. Miller: All right. No further questions.

The Court: You understand, I have ruled in your favor.

Mr. Miller: Oh, I am sorry, your Honor.

Q. Will you please state Mr. Coons' practices in regard to bringing mules in and shipping them out?

A. All I know, he shipped several loads in and would usually keep them a while and ship them out.

Q. How long would he keep them in the Washington Corral?

Mr. Wulff: I still think that is objectionable, what he did on prior occasions.

The Court: Well, you opened the question up

(Testimony of Don Courtney.)

yourself, Mr. [210] Wulff, by asking your witness Perine about the custom he followed.

Mr. Wulff: He wasn't my witness, your Honor, he was called by the plaintiff, and under 43 he is not a managing officer or director, so he is their witness, not mine.

The Court: Well, wait a minute——

Mr. Wulff: Subdivision (d) of Rule 43, your Honor.

The Court: Well, let's see what it says, Rule 43 is even more broad than Section 2055 of the Code of Civil Procedure.

Mr. Wulff: I have a copy here.

The Court: So do I.

“A party may interrogate any unwilling or hostile witness by leading questions, a party may call an adverse party or an officer, director, or managing agent of a public or private corporation or a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he were called as an adverse party, and the witness thus called may be contradicted or impeached by or on behalf of the adverse party, who may be cross-examined by the adverse party only upon the subject matter of the examination.”

Mr. Wulff: Now, he is not an officer, director or [211] managing agent of the Southern Pacific.

The Court: What do you call him, then?

Mr. Wulff: He didn't call him anything; he just called him.

(Testimony of Don Courtney.)

The Court: I know, but what do you call him? He testified that he was——

Mr. Wulff: He is an employee, one of 50,000 employees, and nothing else.

The Court: He testified he was in charge of a certain facet of their business. I have forgotten what it was.

Mr. Wulff: That isn't a managing agent.

The Court: Well, I rule that it is.

Mr. Wulff: I can furnish cases to the contrary, if the Court desires them.

Q. (By Mr. Miller): Mr. Courtney, will you please state for what period of time—first of all, over what period of time to your knowledge did Mr. Coons ship animals in and out of that Washington Corral? A. You mean how often?

Q. No. When did he first start shipping them in there, to your knowledge, how long ago?

A. Well, I would say a period of four years.

Q. Over a period of four years?

A. It could have been longer; I mean, I would say in the neighborhood of that. [212]

Q. And that is because you saw them shipped in there and you saw him with them?

A. That is right.

Q. And that is from your own personal observation, is it not? A. That is right.

Q. And how frequently would he bring animals into that corral?

The Court: I don't see, Mr. Miller, that this has any bearing upon the case.

(Testimony of Don Courtney.)

Mr. Miller: I would like to show, your Honor, that the mules that he would bring in would stay in the corral anywhere from three days to a week and then Mr. Coons would ship them out, usually on the S.P.

The Court: Well, ask him that, then.

Mr. Miller: All right.

Mr. Wulff: If your Honor please, there are records of all those things. I don't know why they are material. In other words, in his opening statement he stated that the shipment was sent from a place in Texas to Sacramento and arrived in Sacramento. Now, what he does after they arrived is entirely immaterial as far as the railroad is concerned. It is his property.

The Court: You may be correct on that, Mr. Wulff, but until I hear all the evidence, I can't make a decision on the matter. [213]

Q. (By Mr. Miller: Will you answer the question, Mr. Courtney? How long would Mr. Coons keep the animals in the corral?

A. He has kept them for a period of a week at a time, three or four days.

Q. Three or four days to a week, is that your testimony, sir? A. Yes, sir.

Q. And how would they be shipped out by Mr. Coons, or would they be taken out of the corral at the end of that period? A. By the S.P.

Q. By the S.P. Following their arrival in Sacramento on the evening of the 17th, did you have occasion to talk to Mr. Coons?

(Testimony of Don Courtney.)

A. Just when he was up there putting horses and mules in. I talked to him just a few minutes and I just turned around and went home, because I was late and I had been out all day.

Q. Will you please state the contents of that conversation?

Mr. Wulff: Objected to, if your Honor please, as hearsay.

The Court: The objection is sustained.

Mr. Miller: Your Honor, the point I wish to raise here is that we feel that in allowing Mr. Coons to go onto the S.P. property and perform a function of feeding and watering this livestock, which we maintain is a non-delegable function of the railroad, that the railroad constituted Mr. Coons as their agent, and that statements made within the scope——

The Court: Stop right there, Mr. Miller. Nobody can prove [214] their agency by their own extra-judicial statement. You have got to establish the agency by someone who knows other than the extra-judicial statement of the purported agent. Everybody could run around and say, "I am the agent of Mr. Miller," and bind you over at the bank on notes and other things.

Mr. Miller: Your Honor, there has been testimony that Mr. Coons requested permission of the S.P. to feed these livestock, and as a matter of law I think the Court can rule that it is the duty of the Southern Pacific when they are holding these ani-

(Testimony of Don Courtney.)

imals in the course of shipment to feed and water them.

The Court: The trouble is, you haven't shown that.

Mr. Wulff: The statute is to the contrary, your Honor.

The Court: Well, the facts are to the contrary at the present time.

Mr. Miller: The offer of proof would be that Mr. Coons stated that he put them back in the corral. The offer of proof would also be that Mr. Coons stated that the animals must have escaped from the corral, or some children must have let them out.

No further questions, Mr. Courtney.

Mr. Wulff: Mister——

The Court: Now, wait a minute. I assume your objection is going to stand in view of the offer of proof, Mr. Wulff?

Mr. Wulff: Oh, very definitely. [215]

The Court: All right. The objection will be sustained so that you will have a record.

All right, now you may proceed.

Cross-Examination

By Mr. Wulff:

Q. Mr. Courtney, when you left at 10:00 o'clock in the morning, all of the horses were outside the corral, were they not? A. That is right.

(Testimony of Don Courtney.)

Q. When you returned—what time did you return?

A. I would say shortly after 6:00. It was dark.

Q. Slightly after 6:00. At that time the horses were all out of the corral, were they not?

A. They were just across the highway, on—well, it would be just about 8th and E.

Q. They were just putting them in the corral? When you say “the corral,” you mean the wooden ones? A. That is right.

The Court: Excuse me, Mr. Wulff. I think we ought to clear that matter up now. We use the term “corral,” and I might as well say that to me a corral means a wooden or otherwise tightly enclosed area as distinguished from a fence around the particular area. Now, unless somebody has a different understanding of what a corral means, I wish you would refer to the corral as that wooden fence that appears in one of these photographs here, and this other area which I [216] understood Mr. Courtney to testify to a moment ago which had some two wires around it outside, as a fence around a field or area, or whatever you want to call it.

Mr. Wulff: I used the word “corral” solely for the purpose——

The Court: Well, I wasn't criticizing. I just wanted to be sure that we didn't have any misunderstanding about the matter.

Q. (By Mr. Wulff): You understand when we refer to corral that is that wooden corral—(exhibiting document to witness)?

(Testimony of Don Courtney.)

Mr. Robertson: I object, your Honor. We were not allowed to use these pictures. I don't see how Mr. Wulff can use them.

Mr. Wulff: They are in for identification.

Mr. Robertson: They are in for identification only.

The Court: I don't know that because you can't do something, Mr. Wulff can't do something to protect his side of the case.

Mr. Wulff: May I refer to them, your Honor?

The Court: You may refer to them.

Mr. Wulff: Referring to Plaintiff's Exhibit——

The Court: I don't mean by that that there is going to be one set of rules for you and one set of rules for him, but there are certain things that might be objectionable to you that certainly wouldn't be objectionable to Mr. Wulff. I have already indicated that there are certain things that you have done that Mr. Wulff did not like that I disagree with [217] him on.

Mr. Wulff: I heard that, too.

Q. Referring to Plaintiff's Exhibits 9 and 10 for identification, I will ask you whether or not you are familiar with the wooden corral which is depicted in this picture, which picture was taken recently, within a week, I would say.

Mr. Robertson: These pictures were not taken within a week. These pictures were taken last September.

Q. (By Mr. Wulff): All right, taken last September, '55.

(Testimony of Don Courtney.)

A. That is a picture of the corral, all right.

Q. You are familiar with those corrals?

A. That is right.

Q. And do you know what condition they were in on December 17, as far as being capable of holding horses?

A. They would always hold livestock, yes.

Q. Were they in good condition? A. Yes.

Q. Now, then, the wire fence you speak about, two wires, was that designed to hold horses?

A. No. I mean, it wouldn't hold——

Mr. Robertson: That calls for an opinion and conclusion of the witness, your Honor, and I object to it.

Q. (By Mr. Wulff): You saw it, did you not?

The Court: Well, I am going to sustain the objection. Describe what was there and I will determine. [218]

Mr. Wulff: I think he has already described it.

Q. Now, did Mr. Coons have some help there?

A. Yes, he had one that helped him quite recently there.

Q. Do you know his name?

A. I think his name is Funk. Everybody called him Tex, is what he is known by.

Q. Did you see him there on the 17th?

A. Yes, he helped feed, he and Mr. Coons.

Q. And did you see him when you got back?

A. Yes.

Q. Now, you spoke about the corrals being muddy. Now, did you notice whether there was any

(Testimony of Don Courtney.)

difference between the eastern and the western corrals?

A. Well, the western corrals, there were two of them that had the little shed over them which protected a little, all right.

Q. Isn't it a fact that the western corrals were drier than the ones on the east?

A. They usually are, yes.

Q. And you know that the horses were kept in there on the 16th? A. Yes.

Q. And you saw them put in there on the night of the 17th? A. Yes.

Q. Now, do you know whether or not there are any feeding [219] racks or bins in there?

A. Oh, yes. All the corrals had feeding racks in them.

Q. And the racks were not muddy, were they?

A. Well, no, in the winter time any corral is muddy when there is livestock in them.

Q. In other words, these corrals are no different from any other corral in the winter time?

A. That is right.

Mr. Wulff: That is all.

Redirect Examination

By Mr. Miller:

Q. Do you know where Mr. Coons is at the present time? A. No, I don't.

Q. How long has it been since you have seen him?

(Testimony of Don Courtney.)

A. Oh, I would say offhanded five months to six months.

Q. Do you know where he went to at that time?

A. No, I don't. All I know is he said he was going back to Arkansas or Arizona, somewhere around in there.

Q. Mr. Courtney, you spoke about a wire fence. Now, can you show me on this Plaintiff's 9 for identification—you state this was a picture of the corral area—can you show me on that where the wire fence is located?

A. No, it isn't on this picture. It would be further west.

Q. Is the fence still there? A. No. [220]

Q. It has been taken out?

A. As far as I know there is no fence there now.

Q. There is no wire fence on the outside of the wooden corral at the present time? A. No.

Mr. Miller: Thank you, Mr. Courtney.

Mr. Wulff: That is all.

Q. (By The Court): Mr. Courtney, will you describe that fence for me, please?

A. Well, gee. I don't know who made. It is just a little old——

Q. I don't care who made it. Just tell me—first tell me are they all the way around an area or are they just simply run along a couple of sides?

A. No, they stretch—I mean, Mr. Coons and Tex stretched one extra wire across the—I would say

(Testimony of Don Courtney.)

the length of this room, just to hold stock in there if they were watched. But a legal fence is a three-wire fence.

Q. Was there some wire all the way around the area where the stock was? A. Yes.

Q. All right. Now, I gather there were two wires in some places and only one wire in other places?

A. Yes.

Q. Let's start on the north side. What was along the north [221] side?

A. The S.P. Corral.

Q. The S.P. corral. That is this wooden corral made out of old ties, I gather, probably two by sixes? A. Two by eights.

Q. Two by eights they look like in that picture there. All right. Now, what was on the east side?

A. It also takes in a little part of the stock-yards.

Q. Was there some fence there, though?

A. Well, it comes out, the way it comes out, it was from the east veering west a little bit.

Q. All right. What was along on the south side?

A. Two-wire fence.

Q. Two wires, barbed wire?

A. Barbed wire.

Q. How frequently was it posted?

A. I would say 20 feet apart.

Q. Was the wire stretched taut, or just loose?

A. It was loose.

Q. Now, then what was along the south side?

(Testimony of Don Courtney.)

A. For a ways there is two wires and then the last portion one wire.

Q. How big was this area? Let's start again on the north side. How long is that north side of that area? Just roughly.

A. I would say 20 feet. [222]

Q. How long on the east side?

A. It would be 150 feet.

Q. How long on the south side?

A. Just about the same as the north side; in other words, about 200 feet.

Q. It was a rectangle then, there wasn't any angle on it? A. No.

Q. (By Mr. Miller): Along the south side, how long was the two-wire fence and how long was the one-wire fence?

A. It would be in the neighborhood of maybe 300 feet.

The Court: Maybe I didn't get that straight. I thought you said it was about 20 feet along the north side.

A. Oh, no. 200 feet.

The Court: 200?

A. That is right.

The Court: I am sorry. And then on the south side, it would also be 200 feet?

A. Pretty well. It tapers in. It doesn't run straight.

The Court: And how much of that was two wires and how much was one wire?

(Testimony of Don Courtney.)

A. I would say two-thirds would be two-wire and one-third one-wire.

Q. And you don't know of your own knowledge who erected that fence or put it in?

A. No; I don't [223]

Q. One other thing, there was some talk about feeding bins or—it doesn't make any difference whether you call it a manger or bin or box or what, do you know, of your own knowledge whether there is some feeding area in each one of the corrals there? A. Yes.

Q. And there was mud there. You mean by that that they were in the mud or do you mean that the animals would have to stand in the mud to eat the fodder or whatever is there?

A. No; they would have to stand in the mud to eat is all.

Q. The fodder wasn't in the mud?

A. No.

The Court: That is all.

Mr. Wulff: Mr. Courtney——

Mr. Miller: Your Honor, may I examine Mr. Courtney prior to Mr. Wulff?

The Court: Yes.

Q. (By Mr. Miller): Mr. Courtney, how long had that wire fence been there?

A. I really can't say, a few horse traders, they call them, used to pull in there, and who put it up or how long has it been there, I don't know.

Q. I am not asking who put it up, I am asking

(Testimony of Don Courtney.)

within your recollection how long that wire fence has been there.

A. I would say five years. [224]

Q. Five years. Mr. Coons didn't put that in, did he? A. Just patched it up is all.

Q. Now, have you ever seen animals fed in there other than Mr. Coons feeding animals within that wire fence enclosure? A. No.

Q. Do you know when that fence was taken down? A. No; I don't.

Q. Do you know who took it down?

A. No; I don't.

Mr. Miller: That is all.

Recross-Examination

By Mr. Wulff:

Q. Just one question here. You didn't see Mr. Coons take out any shipment that came in, did you?

A. No.

Q. Did you ever see Mr. Coons take some horses out by truck?

A. Yes; he has hauled out a few in trucks.

Q. That he sold locally? A. That is right.

Q. And these were what you call chicken horses, were they not?

A. I imagine that is what they are; we call them chicken horses.

Q. They are sold for chicken feed?

A. In Santa Rosa.

Q. And elsewhere, Petaluma?

(Testimony of Don Courtney.)

A. Well, I think it would be Santa Rosa. They say Petaluma, but I mean that would mean Santa Rosa. [225]

Q. But you have seen some shipments come in and he haul them out by truck, Coons?

A. Well, he has hauled a few out of there that he figured was too weak to truck—I mean to put in the S.P. yard one or two times.

Q. Are you familiar with any sales he made in Sacramento?

A. Well, I traded and got a few from him. He just exchanged.

Mr. Wulff: That is all.

Mr. Miller: That is all.

Q. (By Mr. Wulff): Just a minute. Didn't you testify to the Court's questions that Mr. Coons just stretched one wire in a small part of the area?

A. That is right. I would say about one-third of it.

Q. One-third of it. He himself?

A. Yes; just to hold them in.

Q. And two-thirds of it he didn't?

A. That is right.

Q. I mean, two-thirds of it he didn't patch?

A. Yes; I would say yes.

Redirect Examination

By Mr. Miller:

Q. But that fence had been there five years prior to this accident?

A. As far as I know.

(Testimony of Don Courtney.)

Recross-Examination

By Mr. Wulff:

Q. Was the one-third one wire strand there for [226] five years, too?

A. Well, no; it was down; he just patched it up to hold the stock in there.

Q. That is the part Mr. Coons did?

A. Yes.

Mr. Wulff: That is all.

Mr. Miller: That is all, Mr. Courtney.

Your Honor, may the witness be excused?

The Court: Unless there is objection he may be excused.

Mr. Wulff: No objection.

Mr. Robertson: Call Mr. Fisher, your Honor.

Mr. Wulff: This might be a good time, your Honor please. We were served with a notice to produce here and I am in a position to do that now. I assume he may want to do something with it.

The first one, you asked for conditional livestock agreement, shipment of mules and horses from Texas to Sacramento, California.

Now, those were shipped by the Texas Pacific Railroad Company and I am informed that there is only one original the shipper has that, but there is a carbon copy which is retained by the Texas Pacific Railroad Company.

Now, I procured that from the Pacific Texas Railroad Company and I am producing it pursuant to

this demand. It wasn't in our possession, but I have what they forwarded to me [227] as being a carbon copy, showing the signatures, et cetera.

Mr. Robertson: The pencilled notations——

Mr. Wulff: I don't know whose those are.

Mr. Robertson: Were they on when the document arrived?

Mr. Wulff: They were on when I received it.

Mr. Robertson: You don't know who put them on?

Mr. Wulff: No; I don't.

Mr. Robertson: As far as you know, this is a duplicate original?

Mr. Wulff: This is a carbon copy. That is the way I expressed it.

Mr. Robertson: All right. Now, the next document——

Mr. Wulff: The next document is the original diversion report.

If your Honor please, these are original documents here. I have photostatic copies which I will give counsel with it so it may be substituted.

The Court: Very well.

Mr. Wulff: Now, number three. There is no receipt for any shipment at all——

Mr. Robertson: Number three requested——

Mr. Wulff: There is no such thing.

Mr. Robertson: ——“Any and all documents in possession of Southern Pacific Company pertaining to receipt of said animals at Sacramento.” [228]

Mr. Wulff: There is no receipt obtained for any

kind of shipment, whether it is animals or what it is.

Mr. Robertson: Do I understand then there was no receipt signed by Mr. Coons to the Southern Pacific receipting for the delivery of these animals to Mr. Coons?

Mr. Wulff: No; there is no animal receipt given. We have the waybill——

Mr. Robertson: Can we frame that in a stipulation for the record, that when the animals arrived in Sacramento on December 16th, neither on that day or any other day was any written receipt signed by Mr. Coons and delivered to the Southern Pacific receipting for delivery of these animals?

Mr. Wulff: The only thing that the railroad gets, as I understand, they get a receipt for the money, for the payment of the freight. That is the only receipt for the shipment in any form. There is no such thing as a receipt for delivery. Receipt for payment only.

The Court: How would the company get a receipt for the money paid for the freight?

Mr. Wulff: There is a form of receipt for that?

The Court: Well, didn't Mr. Coons pay the money?

Mr. Wulff: He pays the money; yes.

The Court: Well, the company issues a receipt then, not Mr. Coons.

Mr. Wulff: That is right. The company gives a receipt that [229] Coons signed and the company keeps it, but the form of the receipt is on the waybill.

Mr. Robertson: I am speaking of a different matter, your Honor. I am speaking of where the consignee receipts for the goods delivered to him.

Mr. Wulff: There is no receipt for any kind of shipment. The railroad does not follow that practice.

Mr. Robertson: Do I understand the railroad company delivers goods worth a lot of money without getting any receipt from the consignee for the delivery of the goods?

Mr. Wulff: They get a receipt for the freight, that is all the receipt they get.

Mr. Robertson: That is what I am asking for, a receipt——

Mr. Wulff: For the freight bill, money, not for the goods.

Mr. Robertson: How can the railroad get a receipt for money paid by the consignee?

Mr. Wulff: I can't argue that. I am just telling you what is being done.

Mr. Robertson: Well, in other words, so we can clear the record then, will you stipulate that there is no receipt in the files of the Southern Pacific Company signed by Coons receipting for the delivery of these animals?

Mr. Wulff: I will stipulate that in no shipment are receipts for goods shipped taken, as far as my knowledge——

Mr. Robertson: I won't accept that. I will produce the [230] evidence.

Mr. Wulff: What is the next thing?

Mr. Robertson: The next thing is any and all documents in possession of Southern Pacific Com-

pany relating to or pertaining to care of said animals as Sacramento.

Mr. Wulff: They were delivered to Coons on the 16th and were to be delivered back to us and loaded into a car on the 18th.

Mr. Robertson: Do you have in your files a document signed by Coons agreeing to feed and care for them?

Mr. Wulff: No; because the legal obligation was upon him by contract and by law.

Mr. Robertson: But you have no written document in the files in which you got an indemnity agreement or hold harmless agreement from Mr. Coons for feeding the animals in case of endangering anyone?

Mr. Wulff: It is his obligation by contract and under the statute to feed them.

Mr. Robertson: I am only asking if you have one, not the obligation.

Mr. Wulff: There is no such thing.

Mr. Robertson: There is no written authority in your files of any kind authorizing him to feed, signed by Coons?

Mr. Wulff: No; there wouldn't be.

Mr. Robertson: Of course, your Honor, I am not stipulating [231] to this statement of counsel.

Next, any document, contract or receipt in possession of Southern Pacific Company showing the payment to Southern Pacific Company for services rendered relating to the shipment of said animals.

Mr. Wulff: Coons didn't pay the Southern Pacific Company. I haven't checked where it was

paid, but he either paid the Texas Pacific Railway or he paid the Northwestern Pacific Railroad at Santa Rosa. But I have the waybill here, the freight waybill, in which I assume you would be interested. It shows the diversion and shows where they were watered and shows all the data. I have photostatic copies of those. The back shows the receipt by Coons for the shipment in Santa Rosa where he certifies to all the horses.

Mr. Robertson: That is the receipt I am talking about.

Mr. Wulff: That is not a receipt, though. You read it. It deals with what was slaughtered.

Mr. Robertson: It says here, "I hereby certify that all of the horses, mules, burros or asses received at Santa Rosa, California, in Cars AT27608 and AT29117, shipped from Texarkana, Texas, on 12-9-54, were purchased by me from Haas Owens and were slaughtered at Santa Rosa, California, within 30 days after date of arrival."

In other words, this is what I have in mind——

Mr. Wulff: This is not a receipt, though. [232]

Mr. Robertson: That becomes a legal question. Thank you, sir.

Mr. Wulff: Now, I have photostatic copies to be substituted. These are original documents.

Mr. Robertson: We will introduce the originals and stipulate the photostats may be substituted.

Now, your Honor, I am prepared to call Mr. Fisher.

The Court: I suggest in the interests of saving time, you examine those documents that have been

submitted to you in connection with this matter so that when the time comes you can simply offer the photostatic copies, rather than to go through the gyrations of having the originals come in here and having the clerk have to make an entry and then make another entry to get them out. If you are satisfied they are duplicates and Mr. Wulff has provided, he can't make any objection.

Mr. Wulff: I provided them to be photostated.

The Court: All right. Well, I suggest that you spend the next few minutes then doing that and we take a recess until the hour of 1:30.

Mr. Robertson: I have one other matter, your Honor.

The Court: All right.

Mr. Robertson: When this matter was transmitted to the Federal Court the original deposition of Doctor Henning was transmitted, and I have it here and I would like to file it [233] with the Court at this time.

There are X-rays, may it please the Court, that go with this deposition, which we had loaned to counsel and they have returned them and our doctor has them, so we will bring them in at 2:00 o'clock.

Mr. Diepenbrock: I would like to bring up one thing, your Honor. We have a professional witness we wish to put on, and I understand arrangements have been made for him to be here to give his testimony at 10:00 o'clock tomorrow morning, and even though the plaintiff's case may not be finished by that time——

Mr. Robertson: I have no objection to their put-

ting a witness on out of turn, subject to whatever your Honor's wishes are.

Mr. Wulff: Well, I prefer to put our case in in the orderly way, and I will see if we can arrange it. If we can't we will have to do that.

The Court: Well, whatever you wish. I gather there is no objection on the part of Mr. Robertson or Mr. Miller?

Mr. Miller: No objection.

The Court: I understand this deposition here—are you going to put it in evidence?

Mr. Robertson: I am going to read it in evidence, your Honor. I am merely now filing it.

The Court: Well, why spend that time? Why don't you [234] stipulate that I can read it and I will take it and read it tonight and we can just save that much courtroom time for all of us.

Mr. Robertson: Are you willing to stipulate that it may deem to be read in evidence?

The Court: Well, then I will take it home with me tonight and read it tonight and that will save you that much courtroom time.

Mr. Wulff: I will stipulate it be introduced in evidence as a deposition.

Mr. Robertson: Yes.

The Court: All right, then. Why not let the deposition come in evidence right now, then, as Plaintiff's Exhibit 15?

Mr. Robertson: And that the X-ray exhibits attached to the deposition be admitted as a part of it; is that correct, counsel?

Mr. Diepenbrock: I don't know about that.

Mr. Robertson: There were several sets of X-rays and doctors' reports and so forth.

Mr. Diepenbrock: I think we would like to give that some further thought over the recess.

Mr. Wulff: There are certain of them that are objectionable.

Mr. Robertson: What is that, the X-rays?

Mr. Diepenbrock: The X-ray reports.

The Court: Well, it was the X-rays and not the reports, [235] as I understood counsel.

Mr. Wulff: He said X-ray reports.

Mr. Diepenbrock: I understood he was offering both of them with the deposition. Now, it may be that we have no objection to the X-ray reports of the radiologists who took the X-rays.

The Court: Well, under ordinary circumstances they wouldn't be admissible even if Doctor Henning was here.

Mr. Wulff: That is correct, technically speaking.

The Court: The reports themselves, unless they come within the business records rule. Was it your intention to offer those as a part of the deposition?

Mr. Robertson: Yes, your Honor, as part of the deposition these X-rays were submitted.

The Court: We are talking about two different things. They are talking about the reports of the roentgenologist, or whatever they call those gentlemen, that were submitted to Doctor Henning, and even if Doctor Henning were called as a witness here, you couldn't put those reports in in the ab-

sence of them coming in under the uniform business records rule.

Mr. Wulff: They are clearly not a part of the deposition. Our stipulation at this stage merely runs to the deposition.

Mr. Robertson: May it please the Court, I am not making an argument. I am trying to make a statement of fact——

The Court: Well, what I want to get clear here is, do you have any objection to the X-rays themselves? [236]

Mr. Diepenbrock: No, your Honor.

The Court: In other words, it is only the self-serving or the hearsay or whatever you want to call it statements of the roentgenologists that accompany them which you don't want, is that it?

Mr. Diepenbrock: We don't want to stipulate to it as of now, your Honor. We would like to have the noon recess to consider that phase of the matter.

Mr. Robertson: You see, your Honor, each one of these things were marked for identification in the deposition. Now, when your Honor reads this deposition, I think you will conclude that the other party did use these reports in the deposition itself, and your Honor may deem that is a waiver.

As a matter of fact, I want your Honor to be fully informed what the facts are. There are certain X-rays that are marked for identification and then there is doctor's report, and your Honor may rule that is not admissible. I want you to know that. I don't think your Honor can rule on it intelligently until you read the deposition.

Mr. Wulff: Have I seen these reports? I don't think I have.

Mr. Robertson: No. Mr. Diepenbrock has.

Mr. Diepenbrock: I have seen them.

The Court: Well, all I want to get straightened out is, I am going to admit this deposition of Doctor Henning in evidence and also the X-rays that are referred to in it, but I [237] am not going to at this time admit into evidence any documents or any self-serving or hearsay statements that may have been made by some doctor, except that if Mr. Wulff and Mr. Diepenbrock want to consider and agree that they can come in, then they can come in.

Mr. Wulff: By stipulation.

The Court: But I will reserve my ruling until I have read the deposition as to those matters and I will determine at that time in the absence of consent on the part of Mr. Wulff and Mr. Diepenbrock in the meantime.

Mr. Robertson: Thank you.

The Court: All right. Now, that straightens that out.

Mr. Robertson: Yes. What number is that?

The Court: Plaintiff's Exhibit 15. And I think, so the record may be kept straight, that the X-rays that are referred to in that will simply remain a part of that particular record unless they are otherwise placed in evidence and I will in some way identify them, attaching them to the deposition.

Mr. Robertson: Yes. They are identified in the deposition by identifying numbers, your Honor.

The Court: Yes. For the moment I am not going

to do anything more than just leave them stand as the exhibits attached to the deposition.

Mr. Robertson: Yes.

The Court: But I will consider the X-rays, but I will [238] not consider any statements until I have read the deposition or the consideration has been consented to by Mr. Wulff and Mr. Diepenbrock. If they don't stipulate, then I will determine whether or not they are legally admissible.

Mr. Robertson: And for the purposes of the record, the deposition is in evidence, it may be deemed to have been read into the record, and in the event of appeal by either party, will be copied as a part of the transcript on appeal.

The Court: That is right. It is deemed to be before the Court as though it had been fully read here in court.

Mr. Robertson: Thank you.

The Court: I am going to take it home and read it tonight.

(The deposition referred to was marked Plaintiff's Exhibit No. 15 in evidence.)

(Thereupon an adjournment was taken until 1:30 p.m. this date.) [239]

Afternoon Session

Wednesday, March 7, 1956—1:30 P.M.

Mr. Miller: Your Honor, the last I saw of Mr. Robertson he was with the doctor and he was having difficulties parking the doctor's car, so it will be a couple of minutes.

May we have the originals of the documents?

Now, with regard to these originals and self-repeating copies of them, I think we might run into a little difficulty, because in examining the photostats during the lunch hour, we find they do not show up a lot of changes and alterations that have been made nearly so well as the originals, and also on one of them, the diversion request, there are two different types of ink used that we would like to have explained.

Now, I don't know precisely how we can handle this. I suggest——

The Court: The only way it can be handled is, if you insist, to put the original document in evidence, and they can be withdrawn when the case is disposed of.

Mr. Miller: Would that be satisfactory to you, Mr. Wulff?

The Court: It is not a question of whether it will be satisfactory to anybody. The Court so orders. In other words, the documents will be made available just as quickly as we are through with them in this case.

Mr. Miller: Yes; we will stipulate to the withdrawal after the case—— [240]

The Court: We don't need a stipulation; I can make that order.

Mr. Wulff: May we have an order to that effect?

The Court: Yes, you may have that order right now.

Mr. Miller: I would like to offer into evidence at this time first of all the diversion request dated December 18, 1954.

Secondly, I would like to offer——

The Court: Wait a minute. Let's get this taken care of. Let that be marked Plaintiff's Exhibit 16.

(The document referred to was marked Plaintiff's Exhibit No. 16 for identification and in evidence.)

Mr. Wulff: Now, the original livestock contract is being photostated and will be here in ten minutes.

Mr. Miller: That will be fine. I think with regard to that, we won't need the original.

The livestock freight waybill for car No. AT27608, dated December 9, 1954, we offer that in evidence at this time.

The Court: It will be received and marked Plaintiff's Exhibit No. 17.

(The document referred to was marked Plaintiff's Exhibit No. 17 in evidence.)

Mr. Miller: The livestock freight waybill for car No. AT29117 with a certificate pasted to the reverse side—the waybill is dated December 9, 1954, and the certificate is dated December 22, 1954—I offer into evidence at this time. [241]

The Court: Plaintiff's Exhibit 18.

(The document referred to was marked Plaintiff's Exhibit No. 18 in evidence.)

Mr. Miller: Your Honor, for what it is worth I have a United States Geographic Survey map which I obtained from the office of the United States Geographic Survey in Sacramento, together with a pamphlet explaining the marking on the map, published by the United States Geographic Survey.

I might say that this map is of the Sacramento west quadrangle; it shows the topography of the general area of Broderick, Bryte and West Sacramento.

I might say that this map does not show—this map was made before the new West Sacramento Freeway was built and does not show the new West Sacramento Freeway. I am advised that they have a copy coming out shortly showing that new freeway.

However, the map is valuable in that it shows the distances from Broderick to the old Route 40 which runs to the north of the new Route 40.

I would like to offer the map of the Sacramento West Quadrangle and a pamphlet published by the United States Geographic Survey, which accompanies the map, into evidence at this time.

Mr. Wulff: If your Honor please, the only objection I have is that it is pre-freeway. The cross-overs are not there, the [242] locations are not there. There is a very substantial difference between the location of the freeway and the old Route 40 which is now West Capitol Avenue. I think it is going to tend to confuse and not to help.

The Court: Well, I am inclined to agree with you. In other words, it is a map that is out of date, and you tell me the only purpose you want to offer it is because it shows some distances. Why can't you go out there in an automobile and drive those distances, you gentlemen ought to be able to stipulate to that. If you can't do it, maybe you would be willing that I drive my car out there and find out.

Mr. Wulff: We will be perfectly happy to stipulate——

Mr. Miller: Your Honor, I was going to suggest that it might be advisable at this time, if Mr. Wulff is willing to stipulate, that we stipulate that the Court can examine this whole area that is involved in this particular accident. In other words, to go out and take a view of the West Sacramento Freeway and a view of the corrals between 7th and H Streets on into Broderick. Would that be satisfactory, Mr. Wulff?

Mr. Wulff: Your Honor, there is one very serious objection to it which I have learned through years of practice to my very severe detriment. In other words, you waive your appeal when you do that, because any judgment may be affirmed on something the judge may have seen out there. Unless the judge and counsel are willing to enter into a stipulation that [243] the judge hasn't seen anything except that that is introduced into evidence in open court——

The Court: I am not going to have any half-way stipulation or half-way agreement.

Mr. Wulff: Therefore under those circumstances I cannot stipulate because you waive an appeal.

Mr. Miller: I think it would be proper at this time for the plaintiff to request that the Court—there seems to be a serious doubt in the Court's mind or a serious question in the Court's mind as to the grade and slope of the Park Street Overpass and the location——

The Court: You assume something that is not in evidence when you say that. The only doubt in the Court's mind is what the witness is trying to say, and I still don't know what the witness is trying to say, I will tell you very frankly. One moment he will tell me that for a quarter of a mile you couldn't see the road ahead, the next moment he said you can. I might as well be perfectly blunt with you and tell you that the traffic officer made a very poor impression on the Court. For a man who is as skilled as you propose to be, his testimony, in my opinion, is practically worthless.

That is not to be taken as any indication as to how I may feel about the overall testimony, but I don't want you to get any impression that I was putting in my personal views about the matter in the record, because that wasn't it. I was trying [244] to find out from that witness what he meant, and I would be less than honest with you if I didn't say I never did find out.

Mr. Miller: Well, I think, your Honor, that if you examined that overpass in an automobile as I have examined it personally, I feel that actually seeing it, a lot of things that the highway patrolman

said would be clear in the Court's mind after that examination was made, and I request at this time that the Court examine the Park Street Overpass and also examine—not the corral itself, but the area of the corral, to determine distance, or I could myself, I could take a car and I could drive from the freeway to the corral and give the Court an exact measurement of the distance.

But I would suggest very strongly and do request that the Court examine the Park Street Overpass and the West Sacramento Freeway.

The Court: Well, I think I have no right to examine anything outside of this courtroom in the absence of a stipulation of the parties.

Mr. Wulff: If the Court would be willing to state in open court to the reporter what he saw when he went out there—all I am asking for is we have a record of it, your Honor, that is all, and I think both litigants are entitled to that.

The Court: Well, I am not questioning your right on that matter. I am simply saying that I am not going to be assuming the burden of trying this case for you gentlemen, and that is [245] tantamount to what you are asking me to do on both sides. You are asking me to go out here and look at things so you won't have to produce evidence, and Mr. Wulff is asking me to come back here and tell you everything I saw so he won't have to produce evidence in that regard.

I think you are both within your rights, but I think you are casting an undue burden upon the Court, and I decline to do it.

Mr. Miller: Your Honor, at this time I have the carbon copy of the uniform livestock contract covering the animals in question; it is dated December 9, 1954, and I would like to offer this into evidence at this time.

Mr. Wulff: That is the carbon copy?

Mr. Miller: The carbon copy. I understand——

Mr. Wulff: I think that is better, because that small print is hard to read on the photostatic copy.

The Court: Plaintiff's Exhibit 19.

(The document referred to was marked Plaintiff's Exhibit 19 in evidence.)

Mr. Wulff: That may be substituted, your Honor, the same way as all of them, when the case is through?

The Court: The same order is made as to all of them, when the case is through, the exhibits can be released to the parties who produced them.

Mr. Miller: Thank you, your Honor. [246]

Mr. Robertson: Your Honor, I could call Sigmund Fisher, but I wish to not call him at this time. The medical doctor is here in court. Doctor Sanderson, please.

(Doctor Herbert C. Sanderson was called and sworn as a witness for the Plaintiff, and his testimony is omitted from this transcript.) [247]

SIGMUND A. FISHER

called as a witness on behalf of the Plaintiff, sworn:

Direct Examination

By Mr. Robertson:

Q. Mr. Fisher, would you state, please, by whom you are employed?

A. By the Southern Pacific Company.

Q. And how long have you been so employed?

A. October 9, 1917.

Q. And what was your position of employment with the Southern Pacific Company around December 17, 1954?

A. Freight Agent.

Q. And did you hold that position as freight agent for some time before that date?

A. Let me see. July 1st, 1952.

Q. So from July 1st, 1952, to the present time you have been the freight agent?

A. I have.

Q. Would you please tell His Honor what your duties are as freight agent for the Southern Pacific Company?

A. Well, I supervise the Sacramento freight station, the employees, and also the solicitation of freight.

Q. Also as a part of your duties are you in charge of the Washington Street corrals of the Southern Pacific Company at Broderick?

A. I am. [248]

Q. And insofar as being in charge of the Washington Street corrals, what are your duties in respect to those corrals?

(Testimony of Sigmund A. Fisher.)

A. To see that they are properly maintained and so forth.

Q. And what do you mean by the "and so forth"? What else are your duties in relation to them?

A. To maintain the corrals.

Q. Maintain the corrals? Are you required to inspect them periodically?

A. To make inspections, yes, periodic inspections, I do.

Q. And how often are you required to inspect them?

A. Oh, I generally make them once a month.

Q. Are there any written instructions pertaining to your position as freight agent that you know of that were prepared by your employer Southern Pacific Company?

A. No.

Q. Are there any written instructions by your employer pertaining to your duties in the maintenance of the Washington Street corral?

A. No, there is not.

Q. Could you tell us, please, how often you inspected the Washington Street Corrals in the year 1954?

A. I couldn't tell you, sir.

Q. Do you have any independent recollection of inspecting the Washington Street corrals in the year 1954?

A. Oh, yes, I go over there once a month, but the dates I [249] cannot tell you.

Q. Is it your testimony that you have an independent recollection that during the year 1954, you went there at least once a month to inspect them?

(Testimony of Sigmund A. Fisher.)

A. Yes, sir.

Q. And during that period and prior to the day of this accident, which was December 17, 1954, from your inspections of the corral, did you order any changes made in the structure of the corrals in any way?

A. Beg your pardon? What was that question again?

Q. As a result of your inspections of the Washington Street corral in the year 1954, up to the time of the accident in December, did you cause any repairs or corrections to be made to the corrals themselves at Washington Street?

A. Prior to the accident.

Q. You did? Just prior to the accident?

A. No, during the year.

Q. During the year. Do you know when that was done? A. No, I do not.

Q. Do you know what repairs you ordered to be made to the corrals in 1954?

A. Well, occasionally there was the valves connected there that feed the watering troughs, and I believe there was some feed racks repaired. I do not have a list of the repairs, so I don't know. [250]

Q. You do not have a list?

A. No, I do not.

Q. If you inspect the corral up there and you see something that should be done, how do you cause the repair to be made?

A. I phone the bridge and building supervisor.

(Testimony of Sigmund A. Fisher.)

Q. And is any written memorandum, such as a work order, sent to him for that?

A. No, I do not send him any.

Q. After the repairs are accomplished, does the Bridge and Building Department cause you to sign any work order showing work done?

A. No, he does not.

Q. Of your own knowledge does the Southern Pacific Company maintain any written record of the repairs or alterations made on the Washington Street corral?

A. I don't know if the Bridge and Building Department does, I do not know.

Q. Of your own knowledge, you have never seen any yourself?

A. I have never seen any, no, sir.

Q. Prior to the accident do you know of your own independent recollection whether or not any repairs were ordered by you to be made to the gates of the Washington Street corral?

A. I don't remember.

Q. You don't remember?

A. I don't know, sir. [251]

Q. You don't know? A. No.

Q. Now, by that do you mean you don't know whether you ordered any, is that correct?

A. That is right.

Q. Do you know whether any repairs were made to the gates of the corrals prior to the accident?

A. I don't know.

Q. However, you did inspect them once a month?

(Testimony of Sigmund A. Fisher.)

A. Yes.

Q. Now, Mr. Fisher, can you tell us, please, how the gates of the Washington Street corral were fastened prior to December, 1954?

A. Well, they have a latch, a sliding latch.

Q. So that a board would slide along horizontally to the ground and fit into a slot in a bolt, would that be it?

A. It would slide into a post, into a slot. Back of that slot is a kick block on there to prevent this latch from coming back.

Q. How do you pull the sliding lock back to open the gate, then?

A. You have to use your hand to do that.

Q. And do you know that this condition existed on the gates at the Washington Street corral on or about December 1954?

A. Yes, they were equipped with these latches.

Q. And from your own personal inspection you know that?

A. Yes.

Q. Was there any chains with steel locks to lock the gates of the corral on the Washington Street corral gates in December, 1954?

A. I don't remember.

Q. You remember they had the sliding latch?

A. That is correct, sliding latches.

Q. And do you remember seeing any chains and locks on the gates?

A. There were chains there, but whether they were locked, I do not know.

Q. Did you inspect the Washington Street cor-

(Testimony of Sigmund A. Fisher.)

rals during the month of December, 1954, and before the happening of this accident?

A. I couldn't tell you.

Q. Do you have a diary that you keep in your office showing what you were doing on given days in a given month?

A. No, I do not keep any.

Q. Do you forward any kind of a weekly or a monthly report to any superior in your company showing what you have done?

A. No, I do not, no.

Q. Is there any method by which you could ascertain whether or not from your records in your office or otherwise, whether or not you inspected the corrals prior to the happening of [253] the accident and during the month of December, 1954?

A. I do not know of any records.

Q. Mr. Fisher, are you charged as a freight agent with the responsibility for livestock that is being shipped by your railway in this area?

A. Yes.

Q. Are you notified when livestock shipments are to arrive in Sacramento on your railway lines?

A. They notify our office on the arrival of the cars in Sacramento, the yard office notifies the freight office.

Q. When you say that "they" notify, who do you mean by that?

A. I mean the yard office; we will say the chief clerk in the yard office, which is located at 12th Street.

Q. Now, let's get right into this given shipment

(Testimony of Sigmund A. Fisher.)

of two cars of mules, 27 mules, I believe, or 28 mules, in one car and 29 mules in another car, are you familiar with that shipment of mules?

A. Yes, I am familiar with it, but I don't know how many were in each car.

Q. Yes. Now that shipment of mules as appears from records in the evidence, left Texarkana, Texas, on December 9, 1954, shipped by Charles Owens, consigned to H. L. Coon, is that correct?

A. I would have to see the record to know that.

Q. I will show you uniform livestock contract, Plaintiff's [254] Exhibit 19, and ask you if that would demonstrate that?

A. Yes, sir, it would.

Q. So the statement I made a moment ago to you is correct? A. Yes.

Q. All right, now, does that agreement show how those livestock were routed?

A. Well, they originated on the Texas Pacific, and according to the routing here they moved into Sweetwater, Texas, and then were turned over to the Santa Fe at Bakersfield—no, turned over to the Santa Fe at Sweetwater, Texas, and then from there were turned over to the S.P. at Bakersfield, California.

Q. Now, from your experience can you explain this particular shipment, what you mean by "turn over"? Would there be a physical change, or a paper change?

A. No, it is an interchange point between railroads.

(Testimony of Sigmund A. Fisher.)

Q. So the mules or animals would remain in the same car? A. That is right.

Q. And then your train would pick them up and haul them from Bakersfield on into Sacramento, is that correct? A. Yes, that is correct.

Q. Could you explain, because I don't understand these things, they left Texarkana on the Texas Pacific Railway, pulled by the Texas Pacific Railway engines, is that correct?

A. That is correct.

Q. And they went to Sweetwater, Texas, is that correct? [255] A. That is correct.

Q. And there they were picked up by the Atchison Topeka and Santa Fe Railway? A. Yes.

Q. And they were brought by that railway company in the same cars to Bakersfield, is that correct?

A. As to the same cars now, I would have to see the waybills to see if they rode in the same cars or not.

Q. I will show you Plaintiff's Exhibits 17 and 18 and ask you if those are the waybills?

A. Those are the waybills, yes.

Q. And do they show that the mules remained in the same cars?

A. No, they did not remain in the same cars.

Q. What were the numbers of the cars when they left Texarkana, Texas?

A. According to the waybill they left in car TP22165.

Q. That is crossed out though, is it not?

A. That is crossed out.

(Testimony of Sigmund A. Fisher.)

Q. And is there not written where that is crossed out, in ink, "AT27608"? A. That is correct.

Q. So from that being crossed out and the other car number written in, it would appear that they left in AT27608?

A. No, I wouldn't say that. These cars possibly were transferred— [256] the waybill doesn't show here whether the cars were transferred——

Mr. Wulff: I don't know what counsel's purpose on this is. I think it is immaterial. Whether they were transferred in Texas has nothing to do with the horses being on the highway on the 17th day of December in Yolo County.

The Court: What is the purpose of the testimony, Mr. Robertson?

Mr. Robertson: The purpose of the testimony is to establish the control and possession of the S.P. of these mules and horses. We wish to show that they left in two given railway cars and arrived in Sacramento in two given railway cars, those two railway cars were held here in Sacramento for two days, and they were shipped out in the same two railway cars and arrived at Santa Rosa in the same two railway cars, and at Santa Rosa a receipt of delivery was signed by the consignee of the mules to the railroad, receipting for delivery at Santa Rosa.

I think we have a right to establish that. It is evident that if these cars——

The Court: What difference does it make what cars they were in down in Texas or Arizona or New

(Testimony of Sigmund A. Fisher.)

Mexico or anywhere, except that they arrived here in Sacramento in two cars? That is where the important testimony begins in my view.

Mr. Robertson: It makes this difference from a legal [257] standpoint: There is freight that has to be paid on these animals. They are brought in in two cars; they remain in those cars; they are unloaded; they are held here, and then they are reloaded on the same cars and they are moved out, and freight is paid for the use of those cars and the service is rendered. I think that all ties in to who has control of these animals.

The Court: Well, they were in two Santa Fe cars according to the testimony.

Mr. Robertson: No.

The Court: The Santa Fe may be the person that is responsible.

Mr. Robertson: Well, that is just the purpose I want to go into that evidence. Let me ask the witness this question:

Q. Is it usual for the Southern Pacific Railway Company to use cars of the Atchison Topeka and Santa Fe or Texas Pacific, and vice versa, for those companies to use your cars? A. It is, yes.

Q. It is the usual practice, is that correct?

A. Yes.

Q. And they are just exchanged back and forth and records are kept where those cars are, and so forth? A. That is right.

Q. And the fact that you might be hauling mules in Texas Pacific owned cars on your own lines, you

(Testimony of Sigmund A. Fisher.)

would still be paid, [258] that is, the Southern Pacific, is that correct.

A. That is right. We would be paid.

Q. The mere fact that you were using the Atchison——

The Court: Well, wait a minute now. Let's stop right there. Would you be paid for the Texas Pacific hauling the mules from Texarkana to Sweetwater?

A. I didn't get your question, your Honor.

Q. Well, according to the testimony, this shipment originated in Texarkana.

A. That is right.

Q. And they went to Sweetwater, where they were shuttled over from the—what was that, the Texas Pacific or Missouri Pacific?

A. The Texas Pacific to the Santa Fe.

Q. To the Santa Fe. Would you get paid for hauling those mules from Texarkana to Sweetwater?

A. Yes, sir, we would. We would get paid from the point of origin, which is Texarkana.

Q. (By Mr. Robertson): To Sacramento?

A. To Sacramento. We would get paid for the entire haul, which is paid by the shipper.

The Court: You would get the money for it?

A. Yes, we get the money.

Q. Well, who gets to keep the money?

A. Well, then, this money here is—the Texas Pacific and [259] the Santa Fe, they will get a proportion of the through rate through an auditor's settlement.

(Testimony of Sigmund A. Fisher.)

Q. Well, don't you figure out the number of miles that each railroad pulls the car, and they get that percentage on some schedule that is filed with the Interstate Commerce Commission?

A. Yes. We don't do that here, your Honor. That is done in San Francisco.

Q. But that is done in the Interstate Commerce Commission—the tariff is there.

A. That is correct.

Mr. Wulff: Now, your Honor, I think we can stipulate that where a car is routed over more than one railroad, the proceeds are collected by the designated railroad and the monies so collected——

The Court: But they don't belong to the destination railroad.

Mr. Wulff: No.

The Court: Under the rules of the Interstate Commerce that is apportioned according to the tariffs that are on file in their office.

Mr. Wulff: That is correct. The money is then apportioned among all participating carriers according to the tariffs.

The Court: I don't see what difference it makes then who was carrying them down in Texas or New Mexico or Arizona.

Mr. Robertson: I am merely trying to trace for the record [260] and establish for the record the carriage from there to here.

The Court: What difference does it make?

Mr. Robertson: I think, your Honor, we are en-

(Testimony of Sigmund A. Fisher.)

titled to ascertain what that is. Now, this is the tract——

The Court: If it is just for educational purposes, you do that outside of court, but if it has some legal bearing, all right.

Q. (By Mr. Robertson): Mr. Fisher, isn't it a fact that for the carriage from Bakersfield, California, to Santa Rosa, California, of these horses and mules, the Southern Pacific Company would receive compensation? A. Yes, they would.

Q. All right. Now, will you tell us what were the numbers of the railway cars on which these mules arrived in Sacramento?

A. I would have to see the records.

Q. All right.

A. According to the waybills it would be——

Mr. Wulff: Here is the switch list, if you want it. This shows that they came into Sacramento.

Q. (By Mr. Robertson): I will show you the stock book, Plaintiff's Exhibit 1 in evidence, the feeding yard record, that is a record kept of cars that come in, is that right, when livestock are unloaded? A. Yes.

Q. And does that stock book indicate what the numbers of the [261] cars were?

A. Yes, it does.

Q. All right. And does AT29117——

A. That is right.

Q. ——29 head, and AT27608, 28 head——

A. That is right.

(Testimony of Sigmund A. Fisher.)

Q. Those are the cars that arrived in Sacramento with the mules, is that correct?

A. That is right.

Q. All right. Now, do you know what disposition was made of those two railway cars after December 16, 1954?

A. After? According to the records, they went to Santa Rosa, California.

Q. And when did they go to Santa Rosa, California?

A. We received the diversion order, I believe it was, on December the 18th.

Q. From whom did you receive the diversion order? A. From H. L. Coon.

Q. And that is, as I show you here, Plaintiff's Exhibit 16 order? A. That is right.

Q. And what does that order, diversion order, show with regard to the shipment of the mules from Sacramento to Santa Rosa?

Mr. Wulff: I think the document speaks for itself, unless [262] you want something explained on there.

A. I don't know what you want.

Q. (By Mr. Robertson): All right. Does it show that the mules went out in the same railroad cars that they came in on?

A. Yes, it does. The diversion order applied to the same two cars, yes, sir.

Q. Therefore the two cars that the mules were brought in on on the 16th were the same two cars

(Testimony of Sigmund A. Fisher.)

used in which the mules were shipped from Sacramento to Santa Rosa, is that correct?

A. That is right.

Q. And can you tell us would those cars have remained over at the stockyards for those days awaiting the trip to Santa Rosa? Do you know what happened to the cars?

The Court: Let me hear the question.

Mr. Robertson: I'd better withdraw it. It is a little cumbersome, your Honor.

The Court: All right.

Q. (By Mr. Robertson): Do you know whether or not those two railroad cars were left spotted right there at the Washington Street Corrals from the 16th of December to the 18th of December?

A. I don't know that without referring to the yard check; whether they were pulled away from there or not, I do not know.

Q. Would you be kind enough this evening to refer to the yard check and then let us know tomorrow? Can you do that, [263] Mr.—

A. I think so, if they are available.

Q. How long does your company keep the yard check records on file?

A. Well, there is various dates as to the length we should keep each record.

Mr. Wulff: If they are available, we will get that for you. Let's make it short.

Q. (By Mr. Robertson): You will make the survey?

A. If it is available, yes, I will get that.

(Testimony of Sigmund A. Fisher.)

Q. That is all we ask. Now, Mr. Fisher, can you tell us in the uniform livestock contract which is in evidence here as No. 19 for the plaintiff, or in the two bills of lading which are Plaintiff's 17 and 18, is there any reference in those contracts as to feeding and watering of livestock while they are en route from the point of origin to Sacramento?

A. Well, the waybills here show that they were unloaded at Sweetwater, Texas.

Q. No. Maybe I misunderstand. First——

Mr. Wulff: He is answering the question. You asked the question whether the waybills showed——

Mr. Robertson: Let him answer it and then I will move to strike as not responsive.

The Court: Well, your motion will be denied. Now let's quit this foolishness here and get down to business. If you are just asking him what is in those papers there, I can read [264] it as well as he can. Now, if you have got some point, make it.

Mr. Robertson: I am making the point, your Honor, which is one of the most elemental points in this case, who is to feed or water these animals.

The Court: Well, all right. I am the one who is to determine that, not that witness there.

Mr. Robertson: The document, your Honor, I want to find out from the document——

The Court: Mr. Robertson, you may not think so, but I can read.

Mr. Robertson: I understand that.

The Court: And those documents are the best evidence, and this witness here can testify until he

(Testimony of Sigmund A. Fisher.)

is blue in the face that there is something in there that isn't in there, or that there isn't something in there that is in there, and it won't have any bearing at all in this case. Now, that is a fundamental principle of law, that written documents speak for themselves, and no oral testimony is of any value in connection with them.

Mr. Wulff: Your Honor, may I be of assistance to cut the time short on the situation? The contracts themselves refer to the tariffs, and the tariffs provide for the feeding and the watering. I have the tariffs here if counsel is interested. But the witness can——

The Court: I just don't want any more examination by [265] either side of a witness asking him what a document says, because if it is to be interpreted, I will interpret it. If it is there in black and white I can read it.

Mr. Robertson: If it please the Court, do I understand that I am not to show that these documents demonstrate that these horses were pulled off at a given point and watered and fed by the S. P. and the other railroads? That is what I want to get, and we can get it very fast.

The Court: It doesn't make any difference whether they were pulled off and watered and fed every mile between here and Sacramento. What I am interested in is what happened here in Sacramento and what law and what rules govern the handling of stock here in Sacramento.

Mr. Robertson: If I can briefly state why, then

(Testimony of Sigmund A. Fisher.)

I think your Honor will agree. These records will show that the last time the horses were fed and watered was in Barstow, California, at 2:10 a.m. on December 14th, and that was two days and eight hours later they arrived in Sacramento. That is 58 hours later they got in Sacramento. Our purpose is, and the law is cited to your Honor, that they are required to be taken off and fed every 36 hours. That is our purpose.

The Court: Mr. Coon isn't here suing the Southern Pacific because of their failure to properly care for the animals.

Mr. Robertson: No, but the law provides that the carrier must remove and feed and water them or they have committed a [266] misdemeanor. We are trying to show that they were taken off at Sacramento——

The Court: Then you go to the State court and file a complaint against the Southern Pacific for failing to meet their obligations, but not here.

Mr. Robertson: Well, we are trying to show, your Honor——

Mr. Wulff: You misread the bill of lading, number one——

Mr. Robertson: We are trying to show, your Honor, that they were taken off here to be fed and watered by the Southern Pacific pursuant to their duties under the law.

Mr. Wulff: I beg your pardon.

The Court: Wait a minute, Mr. Wulff. I have got enough trouble here without you getting in on it.

(Testimony of Sigmund A. Fisher.)

Mr. Wulff: I beg your pardon.

The Court: If you want to and can show that, I will permit you to do it. But whether they were fed and watered in Barstow—the Southern Pacific didn't even have them in their custody in Barstow, the Santa Fe had them. So if there was a misdemeanor committed, it was committed down in Imperial County or Kern County or somewhere—I don't know when the Southern Pacific got possession of them, but I doubt if they had them in their possession for 36 hours. Just from the law of averages, I just suspect that they didn't have them in their possession for 36 hours between there and here, and if you want to show and can show that they took them off here [267] for the sole and exclusive purpose of watering and feeding them, I will listen to the testimony.

Mr. Robertson: That is what I am trying to elicit. Therefore I have to show the last place they were fed and watered.

The Court: That doesn't prove a thing, doesn't prove a thing.

Mr. Robertson: Oh, yes.

The Court: Suppose they were taken off at Modesto and fed and watered there and the Southern Pacific Company elected to take them off and feed and water them here again in Sacramento, would that mean then that you would be precluded from showing that they had taken them off to feed and water them? I think not.

The mere fact that they fed and watered them

(Testimony of Sigmund A. Fisher.)

too frequently wouldn't preclude you from showing that they were taken off here for feeding and watering, and the fact that they were taken off not frequently enough doesn't mean that the other side is bound by what some other railroad did, or didn't do.

Mr. Robertson: No, your Honor, but I think you will find when we submit authorities at the appropriate time, that when two or more carriers engage in this, that they are all still bound by the 36-hour rule, regardless of what railroad was last to feed, and animals cannot be transported in a closed train for more than 36 hours no matter who is transporting them, [268] and therefore if the Southern Pacific picks up these two carloads of horses and mules within a given period of time and looking at the waybills see that within eight hours they have to feed them, it is their job then, within eight hours to pull over and feed them.

Mr. Wulff: That is not true. But I don't want to get into an argument. When they got to Sacramento they arrived at their destination.

The Court: Well, we have taken all the time we can take today. We will stand recessed until the hour of 10:00 a.m. tomorrow morning, at which time we will return and resume the trial of this case.

Mr. Robertson: Could I ask one question on your Honor's procedure? Does your Honor usually submit these cases on briefs?

The Court: Well, I can't tell until I hear the case. I would say probably not. I would probably prefer to have an argument, but if it develops that

(Testimony of Sigmund A. Fisher.)

there are half as many complicated law problems that both sides have been posing to me here, I may ask you to file a memorandum.

Mr. Robertson: I am just going to recommend that. I was just wondering about my own plans of preparing, and so forth.

The Court: Well, you better be prepared to argue, but I will tell you better when I hear some of the defense in the case.

Mr. Robertson: Thank you.

(Thereupon an adjournment was taken until Thursday, March 8, 1956, at 10:00 a.m.) [269]

March 8, 1956—10:00 o'Clock A.M.

SIGMUND A. FISHER

resumed the stand and testified further as follows:

Direct Examination

(Continued)

The Clerk: Case No. 7317, Grigg versus Southern Pacific Company, further trial.

The Court: Proceed, gentlemen.

Mr. Miller: Your Honor, as the Court suggested, I made some measurements with my automobile speedometer this morning, and I would like to make a statement as to those measurements if opposing counsel has no objection.

Mr. Wulff: I don't know whether I have or not.

(Testimony of Sigmund A. Fisher.)

Mr. Miller: I think for illustrative purposes here I might use the blackboard.

The Court: Why don't you do this: When court is not in session you gentlemen get together. If you can't get together on it, I can very easily hire somebody to go out there and I will charge it to both parties in this action here now. There is no sense in quibbling over a matter that is as ordinarily plain and simple as this is.

Mr. Wulff: I haven't quibbled over anything, your Honor.

The Court: I am not accusing you of quibbling over it; I am simply suggesting that I don't want any quibbling over it. No accusation is directed to anyone. [270]

Mr. Robertson: Maybe we can arrange a stipulation.

The Court: That is what I said. Why not do it outside of the hours of court here, because you have witnesses waiting and you have other people, and that is something that is too simple to require the taking up the time of the Court, in my opinion. I am sure that both sides—I have nothing to criticize anybody for—I think both sides will be perfectly reasonable about the matter.

Q. (By Mr. Robertson): Mr. Fisher, did you look for the records that we spoke about last night as to the two cars?

A. Yes, I have them in here. It indicates that the cars were on the corral track over there at 8:10 a.m. December the 17th. There was no yard check

(Testimony of Sigmund A. Fisher.)

taken on Saturday, which is the 18th, so all I can give you is as to the 17th.

Q. The two cars were over there?

A. Yes, they were over there.

Q. On the 17th? A. On the 17th.

Mr. Wulff: Witness, did you state what time they were there? I didn't hear you.

A. 8:10 a.m.

Q. (By Mr. Robertson): And, Mr. Fisher, subsequently by the receipt appearing on the back of Plaintiff's Exhibit 18, a bill of lading, those were the same two cars that were taken to Santa [271] Rosa?

A. This is not the bill of lading. This is the certificate that they are there for slaughtering purposes.

Q. It is on the back of that car? A. Yes.

Q. Now, Mr. Fisher, these cars went all the way through from Texas to Santa Rosa, is that correct?

A. Yes.

Q. Mr. Fisher, just one or two other things: These livestock freight waybills which are Plaintiff's Exhibits 17 and 18 in evidence, are they the usual type of documents that accompany the livestock shipment? A. Yes, they are.

Q. And would these be the only documents?

A. They would be the only documents.

Q. And these are the customary instruments?

A. Yes, they are.

Q. Now, there are just one or two things further on this. I notice here it says on Plaintiff's 17, "Has

(Testimony of Sigmund A. Fisher.)

36-hour request been signed and filed at point of origin?" and the answer is, "Yes." What does that mean? What is a 36-hour request?

A. It is covered by law there that the shipper can request the animals to be—to remain in the car for 36 hours.

Q. Then down at the bottom of each of these two waybills there are some times and figures giving various points, and what do those indicate [272] generally?

A. They indicate feeding records or stopping-in-transit records.

Q. Now, Mr. Fisher, the corrals out on Washington Street and that open area adjacent to the corrals up to the street, is that owned by Southern Pacific? A. I don't know, sir.

Q. You don't know? A. No, I don't.

Mr. Robertson: Counsel, perhaps we could stipulate, to save time, if you know, can you stipulate the Southern Pacific Company owns the land upon which the Washington Street corrals are situated and that open area adjoining them?

Mr. Wulff: I have no knowledge myself.

Q. (By Mr. Robertson): I will have to prove that. Would there be somebody at the Southern Pacific Office who would know that, Mr. Fisher?

A. Yes, I believe the Engineer's Office would know that.

Q. What would be the name of the man?

A. Mr. Hargraves.

(Testimony of Sigmund A. Fisher.)

Mr. Wulff: I can check it. I have never checked that. I don't know.

Mr. Robertson: I wonder if we could check that and perhaps arrive at a stipulation to save bringing in the witness.

Mr. Wulff: I think that is immaterial. Title is not concerned. It is who had possession and control of the horses. [273]

The Court: Well, when you can, you will check it?

Mr. Wulff: If he wants me to check it, I will have it checked.

The Court: All right. Suppose you check it. I think in the long run it will save time.

Mr. Robertson: Thank you.

The Court: I don't know whether it is material at this stage of the case or not.

Q. (By Mr. Robertson): Just one other question. When a request is made on the 36-hour matter, as stated in the bill of lading, the animals are removed from the box car, fed and then reloaded again, is that right? A. Yes.

Mr. Robertson: That is all.

Cross-Examination

By Mr. Wulff:

Q. I note pursuant to the livestock contract that they have reference to the tariffs mentioned there being a part of the contract. A. That is right.

Q. Now, I think to save time, if your Honor please—could you tell us where, either in the con-

(Testimony of Sigmund A. Fisher.)

tracts or in the tariffs, there appear the obligations of loading and unloading the shipment? I am speaking now at the start of the shipment and at the destination of the shipment. Where does that appear, in the contract or in the tariffs? [274]

A. That would be on the contract.

Q. Would you point that out? This is such fine print, your Honor, I think it would be of convenience to point out where it appears, and then the contract speaks for itself thereafter.

Mr. Robertson: As you stated before, your Honor, the contract is something that your Honor will read and it speaks for itself.

The Court: The only thing he is doing is pointing out some particular point or place. I don't want it read, but I think if it is pointed out and perhaps even marked with a red pencil or something.

Mr. Wulff: To save the bother of reading all the fine print.

The Witness: Yes; I can hardly read it myself. It says, "Section 4"—

The Court: Don't bother reading it.

Q. (By Mr. Wulff): Would you mark that, please? Do you have a red pencil?

A. I have a red pencil.

The Court: Put a line right at the side of that.

Mr. Robertson: I object to the marking of the document wherein it would involve the conclusion and opinion of this witness as to——

The Court: All right, if you object, Mr. Robertson, don't put the mark on that. If you don't want

(Testimony of Sigmund A. Fisher.)

me to have that help, Mr. Robertson, it is perfectly all right. [275]

Mr. Robertson: Well, I would like your Honor to have all the help, it is only——

The Court: Well, your objection certainly doesn't indicate that. Proceed. Don't waste any more time.

Q. (By Mr. Wulff): Now, relative to the obligation of feeding and watering in transit, where does that appear, in the contract or in the tariffs?

A. It is in the tariff and also in the contract.

Q. Will you show it to us in the contract?

The Court: There is no use going through that, Mr. Wulff. Mr. Robertson objects to your marking it.

Mr. Wulff: I do desire to have the witness call attention to the tariff.

The Court: Well, that part of the thing, but there is no need of him pointing out any particular point, I just have to read the whole thing.

Mr. Wulff: I don't think the Court would know the tariff. Of course, the Court can take judicial knowledge of this.

The Court: I understand that, but the tariff is not in evidence at the present time. I assume it will be before we get through.

Q. (By Mr. Wulff): What provision of the tariff has reference to feeding and watering? Can you find that for us? A. Yes, sir, I have it.

Q. All right, and will you read it, please? [276]

A. It is quite lengthy here.

(Testimony of Sigmund A. Fisher.)

The Court: Is this an extended document?

Mr. Wulff: No, it is not. I think it would take about a half minute.

A. It is our tariff 188-G, it is on page 13b; it says, "Rules and Regulations indicating charging"—

The Court: Well, let me ask you—

A. "Charge governing"—

The Court: These are the tariffs that are filed by you with the Interstate Commerce Commission?

A. They are, sir.

Q. So that they are on file with the Commission?

A. They are on file.

The Court: Proceed.

A. ——"feed, water, rest, change of ownership, sorting and/or consolidation in transit of livestock at Roseville, Sacramento, San Francisco and Stockton, California, rules and regulations."

Do you want me to read the entire page or just—

Q. (By Mr. Wulff): Just read the portion—my question was directed to the portion covering the obligation of feeding and watering in transit.

A. "Item J. The custody and possession of livestock while feeding, watering, resting, sorting and/or consolidation shall be that of the owner and not the carrier." [277]

The Court: Do you have a copy of that you can put in evidence, Mr. Wulff?

Mr. Wulff: Yes, I would like to introduce it in evidence—now, there is another provision on the

(Testimony of Sigmund A. Fisher.)

same page I might speak about now and introduce that. You were reading Paragraph J?

A. J, that is right.

Q. Paragraph J. Now, you were examined on direct examination about diversion orders?

A. Yes.

Q. In other words, as shown on the face of the livestock contract, the destination of shipment was Sacramento?

A. That is right, sir.

Q. And that was the condition when the shipment arrived in Sacramento on December the 16th?

A. That is right.

Q. And that was also the same condition existing on the full day of the 17th of December?

A. That is right.

Mr. Robertson: I will object to the question, your Honor, and move to strike on the ground that it assumes something not in evidence. The contract and the waybill show the destination to be Santa Rosa and not Sacramento.

Mr. Wulff: I beg your pardon. The contract shows Sacramento. It speaks for itself. [278]

The Court: Proceed. The motion is denied.

Q. (By Mr. Wulff): Now, do the tariffs provide for how long after the arrival of the shipment at destination the shipper has a right to divert that shipment to another point?

A. Yes, it does.

Q. Now, I will show you this tariff again. Will you point out the entire provision? If it is the same page, tell us, and then point out the provision, please.

(Testimony of Sigmund A. Fisher.)

A. It is the same tariff, it is on the same page, and is Item B.

“Livestock must be forwarded from the transit point within 20 days after date of arrival. If not forwarded from transit point within the time limit, full local rate from transit point to destination will be assessed.”

Q. Now, can you take that one page out?

A. Yes.

Mr. Wulff: Would that be agreeable, your Honor, instead of having the whole book?

Mr. Robertson: May it please the Court, I would like to have the whole book to see if there is any other portion——

Mr. Wulff: That is agreeable.

The Court: Let the whole book go in evidence, then.

Mr. Wulff: I will submit the book. I am only offering one page, if your Honor please. That is all the material in there that is material to this case. There is no use cluttering [279] the record. If counsel wants to review it and introduce any other part, it is all right with me.

Mr. Robertson: There is no use introducing a part of a record——

Mr. Wulff: In other words, that is the only point dealing with Sacramento.

The Court: Well, wait a minute. The page in question will be put in as Defendants' Exhibit A in this matter. If you want to offer the whole book, you may do so and I will receive it, Mr. Robertson.

(Testimony of Sigmund A. Fisher.)

Mr. Wulff: Do you want to take that page out?

A. Yes.

The Court: Why don't you just leave it in there?

Mr. Wulff: That is all right.

The Court: What page number is that?

A. That is Page 13b, your Honor.

Mr. Wulff: Will you leave an envelope there because——

The Court: Well, the clerk will want to put a marker there, too. That will be marked Defendants' Exhibit A.

(The document referred to was marked Defendants' Exhibit A in evidence.)

Q. (By Mr. Wulff): Now, do you know, Mr. Fisher, when the shipment arrived in Sacramento at 10:00 o'clock in the morning of December 17th, who unloaded the cars?

A. No, I don't know who unloaded the cars. [280]

Q. Do you know who unloaded them?

A. According to the record there they were unloaded by Coon.

Q. By Coon. The Southern Pacific Company did not unload them, did they? A. No.

Q. Now, who took custody of the horses after unloading them?

Mr. Robertson: Object to that, your Honor, as calling for an opinion and conclusion of the witness, assuming——

The Court: Sustained.

(Testimony of Sigmund A. Fisher.)

Q. (By Mr. Wulff): After the horses were unloaded, did the Southern Pacific Company have any person over there in charge of the horses or at the corrals?

A. No, there was no one in charge of the horses. We made an inspection of the horses, as to the count and as to inspection, that is, if there were any dead animals in the car, or any injured animals. That is our obligation to make an inspection.

Mr. Robertson: Move to strike the last sentence as being an opinion of the witness, your Honor, "there is an obligation."

Mr. Wulff: I don't think he said quite that language, but——

The Court: Well, it may go out. That is not what he said, but it can still go out.

Q. (By Mr. Wulff): Now, who was left there with the horses, who stayed there with the horses, if anybody, to your knowledge? [281]

A. I don't know.

Q. But there wasn't any of your employees stayed there? A. No.

Q. Now, do you know who fed and watered the horses after their arrival in Sacramento on the 16th and 17th of December? A. No, I don't.

Q. Did the Southern Pacific Company water them? A. No.

Mr. Robertson: I object to that, your Honor, on the ground he said he doesn't know who fed them.

Mr. Wulff: Well, he knows he didn't.

The Court: Overruled. The answer will stand.

(Testimony of Sigmund A. Fisher.)

Q. (By Mr. Wulff): Do your records show who fed and watered them during that period?

A. No, our records do not show.

Q. Do you want to say why they do not show?

A. Yes, I do.

Mr. Robertson: I object to the question, your Honor, he said his records don't show that, that is it. It is immaterial as to why they don't show.

Mr. Wulff: I think there is a very important reason why they don't show, in railroad parlance.

The Court: The objection is sustained.

Q. (By Mr. Wulff): When this shipment arrived in Sacramento, did you or anybody in your office know what Coon was going to [282] do with that shipment, whether they were to remain delivered in Sacramento, or were to be later diverted, do you know? A. No, we do not.

Q. What was your previous practice on other shipments?

A. Well, his previous practice is that he gets these cars in here and then he will hold them here two or three days and then he will divert them either to Santa Rosa or to Petaluma.

Q. Did he ever dispose of any shipments in Sacramento without diverting them?

A. He has, yes.

Q. And on those occasions you didn't know what he was going to do? A. No, sir; I did not.

Q. Now, in order to divert this shipment, could he add horses to the shipment and then divert them?

(Testimony of Sigmund A. Fisher.)

A. No, they must go out with the same number of head as it came in with.

Q. With the exception of dead horses, I assume?

A. With the exception of dead horses.

Q. Now, do you know what the practice of Mr. Coon was in reference to loading and feeding in Sacramento on shipments arriving here?

A. He would feed and water his own shipments.

Q. Now, I have here a waybill marked Plaintiff's Exhibit 16 and I note on the bottom here, which you testified to be the [283] unloading record and feeding record, and I note under the title, "Sweetwater," there are some figures there in the last column under "Food and Additional Charges." Now, does the fact that that appears there mean something? A. It does.

Q. What is it, sir?

A. It means that these animals were fed by the railroad at that particular point and that indicates to us that those charges must be collected from the shipper or consignee.

Q. Now, you notice the next place is Winslow, is it? A. At Winslow.

Q. Do any charges appear there?

A. No, it does not.

Q. Does that indicate anything definitely to you? A. Yes, it does.

Mr. Robertson: I object to that as calling for an opinion and conclusion. The person may not have entered any charge.

Mr. Wulff: He can tell you.

(Testimony of Sigmund A. Fisher.)

The Court: Overruled.

A. When there are no charges appearing there, we do not protect any charge unless they appear thereon. Otherwise, why, if we—it would indicate that these animals were fed by either the shipper or the consignee.

Q. Now, I notice here on Exhibit 18 no charges appear there for Stratton, Texas. In other words, they were apparently fed [284] there by the shipper, apparently, yes.

Q. You testified that you were freight agent. You are the only freight agent in the City of Sacramento, is that right? A. That is right, sir.

Q. Every station has a freight agent?

A. That is right.

Q. I think you testified that you made periodic inspections of the corrals? A. I do.

Q. The Washington Corrals? A. I do.

Q. And everything that needed repair you reported to the Building and Bridge Department?

A. That is right.

Q. Now, if any of your men happened to see anything out of repair, would they report that to you? A. They would, sir.

Q. And you in turn would report that to the Bridge and Building foreman?

A. That is right.

Q. I think you testified you did not know at that time whether there were any chains or locks available or not, didn't you? A. That is right.

(Testimony of Sigmund A. Fisher.)

Q. In other words, had you had locks and chains out there?

A. We had them on there several times, [285] yes.

Q. And whether they were there that particular day or not, you have no knowledge?

A. I do not know, no.

The Court: Do you make any charge to the shipper or consignee for the use of the corrals either at the—strike that.

Do you make any charge to the shipper or consignee for the use of the corrals at the point of destination? A. No, we do not.

Q. As such? A. No, we do not.

Q. That is a part of the services furnished by the company the same as the car, the rolling stock and the road bed? A. That is correct.

Q. (By Mr. Wulff): Now, do you remember a make-shift wire fence in the vicinity of the corral?

A. Yes.

Q. Did you maintain that for cattle shipments that came in? A. No.

Q. Do you know how that fence got there?

A. No, I do not.

Q. In other words, you never gave any authorization to anybody to use it? A. I did not.

Q. Or anyone in your office, to your [286] knowledge? A. No.

Mr. Wulff: I think that is all the questions.

(Testimony of Sigmund A. Fisher.)

Redirect Examination

By Mr. Robertson:

Q. Mr. Fisher, you did know the fence was there on the property?

A. I saw the fenced area.

Q. And did you ever instruct any shippers of livestock not to use that area? A. No.

Q. Do you know whether any of your stockyard men instructed them not to use it?

A. I do not.

Q. But you knew the fence was there?

A. I saw it there, yes.

Q. Now, Mr. Fisher—counsel, will you refer to Page 6 of his deposition and stipulate from line 2 to line 27 that the questions were——

Mr. Wulff: That the questions were asked and the answers were given, is what you want?

Mr. Robertson: Yes.

Mr. Wulff: What lines?

Mr. Robertson: Line 2, Page 6, to Line 27, Page 6. Will you stipulate that I may read those answers and questions to the witness, counsel?

Mr. Wulff: What is that? [287]

Mr. Robertson: Will you stipulate that I may read those to the witness?

Mr. Wulff: Certainly. I don't have to stipulate.

Q. (By Mr. Robertson): Mr. Fisher, did you give the following answers to the following questions at your deposition:

(Testimony of Sigmund A. Fisher.)

“Q: Now, sir; by whom was the feeding and watering done?

“A. Well, if the shipper requests it, if he requests his own feeding and watering, he will do that himself.

“Q. And if he does not?

“A. Otherwise we will do it, we will perform the services.

“Q. In other words, unless he requests that he do the feeding and watering, you will do it for him? A. Yes.

“Q. And do you have employees who are located at those particular stockyards?

“A. None.

“Q. Can you tell me on or about December 17, 1954, who, if anyone, you had working at this particular stockyard, this corral, I should say?

“A. I don't know of anyone working over there at the time.

“Q. Well, normally when animals are taken care [288] of over there, who takes care of them for the Southern Pacific Company?

“A. Our stock man takes care of them.

“Q. And what is his name?

“A. Anthony Perine.

“Q. Mr. Perine, sitting here?

“A. Yes.

“Q. And is there any other person who works in that particular yard?”

(Testimony of Sigmund A. Fisher.)

Mr. Wulff: Your Honor, I object to that as not inconsistent. I don't know the purpose of it. There is no surprise involved here. He testified to the same thing.

Mr. Robertson: No, he didn't, counsel.

"Q. Is there any other person who works in that particular yard or who has worked there in that particular yard in the last year?

"A. You mean assisting Perine, or what?

"Q. Either working with him or assisting.

"A. Yes. We have another man.

"Q. State his name, please.

"A. Robert Duke.

"Q. Is Mr. Duke still employed by the Southern Pacific Company?

"A. Yes."

You gave those answers to those questions? [289]

A. Yes.

The Court: What part of that do you contend is impeaching, Mr. Robertson?

Mr. Robertson: Well, he stated, your Honor, as I gathered from his testimony, that the S.P. never is required to feed the animals under these tariffs, that the owner is required to do so, and yet his testimony is that the Southern Pacific does so unless requested by the owner to do so.

Mr. Wulff: Well, let's clarify that up. May I take him back on it or do you wish to have him?

Mr. Robertson: Well, I am still examining Mr. Fisher.

(Testimony of Sigmund A. Fisher.)

Mr. Wulff: Very well.

Q. (By Mr. Robertson): You stated that at certain times there were locks over there on the corral that you had seen? A. Yes.

Q. And who would have the keys to those locks?

A. The stockmen, either Perine or Duke, had the keys.

Q. In order to open the corrals, if the owner wanted to feed them, he would have to get the key from one of those men? A. Yes.

Q. Now, on the bill of lading or on the waybill there are charges indicated for feeding at one station and the rest is blank. That is correct, isn't it?

A. That is right.

Q. You don't know of your own personal knowledge who fed the [290] animals at those various stops, do you?

A. No, I don't know who fed the animals, no.

Q. And do you know of your own knowledge whether Mr. Coon accompanied these animals on the trip? A. I do not know that, sir.

Q. Can you tell from the documents whether or not anyone accompanied the animals? Wouldn't it be on the waybill if they were accompanied or not accompanied?

A. That would show on the waybill.

Q. Would you look and tell me if anyone accompanied the animals?

A. According to the waybill there was no one accompanied. It would show on the waybill whether or not there was a man in charge.

(Testimony of Sigmund A. Fisher.)

Q. According to the waybill no one accompanied the animals?

A. According to the waybill, according to the contract, there was no one signed to be in charge.

Q. If someone does sign to go with the animals, they have to sign a release to the railroad of certain liability, do they not?

A. They sign on the reverse side of this contract.

Q. And it is not signed?

A. No, it is not signed.

Q. Now, Mr. Fisher, you say that your responsibility or that of your company is to see that these charges are collected, is [291] that correct?

A. That is correct.

Q. Isn't it a fact that your company has a lien on the animals until the charges are paid? You can hold them and refuse delivery until they are paid?

A. We can hold them, yes.

Q. And I believe you testified previously that no receipt was signed by Mr. Coon for those animals at Sacramento? A. Yes.

Q. Would any of these documents show when payment was made for the shipment?

A. These documents would not.

Q. Do you have any other documents other than these relating to this particular shipment?

A. No.

Q. Actually these documents show that the shipper of these horses and mules was a person by the name of Charles Owens from Texarkana, is that correct?

(Testimony of Sigmund A. Fisher.)

A. Charles Owens, Owens Brothers Stockyards.

Q. They were the shippers?

A. According to the waybill, yes.

Q. And then when animals or freight are ultimately delivered, the company secures a receipt for delivery of them, is that correct?

A. Yes, we do. [292]

Mr. Robertson: That is all, your Honor.

Recross-Examination

By Mr. Wulff:

Q. When a shipment of livestock arrives in Sacramento as its point of destination, what is the first thing your office does relative to that shipment? Do they notify the consignee?

A. We notify the consignee that the stock is in town.

Q. Now, do you feed or water those stock under any circumstances, and if so, what are the circumstances under which you would feed and water?

A. Shipments that are billed to Sacramento we do not feed or water them.

Q. What would happen if the consignee failed to do it or refused to do it?

A. Then it is our obligation to feed them and water them.

Q. How about unloading a shipment that arrives in Sacramento as point of destination after you advise the consignee?

A. The consignee will unload his own stock.

(Testimony of Sigmund A. Fisher.)

Q. And if he refuses to do it, what happens then, in default of that, rather?

A. Then we would have to unload them.

Q. And I assume the 36-hour or 28-hour law requires that? A. Yes, that is right.

Q. In this instance, do you know of any request by Mr. Coon for you to unload or feed or do anything like that or did he [293] ask any permission himself to feed or water?

A. Well, he has indicated on previous occasions that he wanted to feed and water his own animals in Sacramento.

Q. In other words, you had an understanding of that?

A. We had an understanding with him, yes.

Q. Now, you said you didn't know who fed or watered the animals at these stops where it is shown on the waybill that there are no charges listed. That is correct, is it not? A. That is right.

Q. You know that the railroad did not do that?

Mr. Robertson: Well, I object to that. He said he doesn't know who did.

Mr. Wulff: Yes, he did. He testified that if the railroad did, the charges would be inserted in there, did you not?

A. They would be inserted on the waybill.

The Court: Well, I am going to sustain an objection. I don't think it is material to this case.

Q. (By Mr. Wulff): Now, you spoke about you had a lien for collection of freight. Now, do you also have the right to extend credit to a consignee?

(Testimony of Sigmund A. Fisher.)

A. I have, yes.

Mr. Wulff: That is all.

Mr. Robertson: That is all.

The Court: That is all.

Mr. Robertson: I would like to call Mr. [294] Pekema.

Mr. Wulff: If your Honor please, can we take that one page out of that big book? Did you introduce that or not?

The Witness: They have it there.

Mr. Wulff: Counsel, please, what about this big book? There is only one sheet involved there, and the witness has testified——

Mr. Robertson: I don't want this big book.

Mr. Wulff: There, you may take that.

The Court: There is nothing in that that was introduced.

Mr. Robertson: I didn't offer it, your Honor.

The Court: That is what I said, there is nothing in this book here that was offered in evidence.

The Witness: No. They have the tariff over there.

The Court: It was page 13 of that other book. Let the clerk have that so he can mark it. Page 13b of the tariff, Defendants' Exhibit A.

Mr. Wulff: You can take that book and go back to the office.

(Here followed the testimony of Mervin Pekema, and Percy Marcyes, which testimony is omitted from this transcript.)

The Court: We will take the morning recess at this time.

(Recess.) [295]

Mr. Miller: Your Honor, we are going to ask at this time that pages 12a and 13 of the tariff be admitted into evidence.

Mr. Wulff: If your Honor please, there is no application to this territory. They appear on their face to be applicable only to Arizona and Utah, intra-cross-state traffic in that instance, and the other instance, they apply only to Nevada and Oregon intrastate traffic. They are not tariffs in which these shipments went through at all, and they are not tariffs for Sacramento.

Mr. Miller: We feel they should be admitted, your Honor, because they at least contain statements as to the control of the livestock by Southern Pacific. We feel that it shows a right to control. Now, if they——

The Court: Now, wait a minute. Do you concede that those tariffs are only to the territory that Mr. Wulff has indicated? I haven't looked at them.

Mr. Miller: They would indicate on their face that they do not apply to this particular area. However, they contain provisions with regard to the control of livestock, which indicate a right to control of Southern Pacific of the livestock.

The Court: We have got two problems here, number one, we are concerned with a specific shipment here, and number two, as the record now stands, the Southern Pacific never had control of

these animals outside of the State of California, and only partially in the State of California. I don't see how these documents would be helpful to me if you concede they are [296] applicable only to the territory indicated by Mr. Wulff.

Mr. Miller: I concede that they state on their face that they are applicable to those territories. I think we are involved with actually two problems here, one of which is what the S.P. may say is duty, and the other question is what duty they actually have to the general public, and——

The Court: Well, that is either going to have to be contractual or statutory, and by statutory I am including any rules, regulations or tariffs that are laid down pursuant to statute. For instance, the law of the State of Arizona might be thus and so for every shipment that every railroad has through there, but I cannot see by what stretch of the imagination it could have any bearing upon this particular case.

These tariffs that are on file here are not there by the choice of the Southern Pacific Company, they are required to be there by law, and the Interstate Commerce Commission has certain very definite rules and regulations that they lay down.

Mr. Miller: Your Honor, I don't believe that these are rules and regulations of the Interstate Commerce Commission, these are regulations of the Southern Pacific Railroad.

Mr. Wulff: No, your Honor.

The Court: They are required to be filed under

the rules and regulations of the Interstate Commerce Commission. [297]

Mr. Wulff: He doesn't know how to read them, I am afraid. They are tariffs. If your Honor please, may I just show what I have in mind here: Here is paragraph 4 of the bill-of-lading: "The shipper at his own risk and expense shall load and unload livestock in and out of cars except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision."

Now, there are all kinds of tariff provisions. He goes here to Nevada and Oregon and picks out a tariff provision. Now, we come in with the one in—with the one in Sacramento.

The Court: Mr. Wulff, the only thing I can say to you is I'm inclined to favor your side, so I suggest——

Mr. Wulff: So don't let me talk myself out of it.

Mr. Miller: I would like the entire tariff marked for identification, your Honor.

The Court: All right, I will mark the entire tariff as—but once again I may say this, these are official documents which are on file and of which I can take judicial notice, but for the purposes of the record I will mark it as Plaintiff's Exhibit 29 for identification.

Mr. Wulff: My objection is good?

The Court: I am not admitting it in evidence, I am only marking it for identification so they may have their record protected in regard to it if they so desire.

(The documents referred to were marked as Plaintiff's Exhibit 29 for identification.) [298]

Mr. Robertson: May it please the Court, may the witness Pekema and the witness Marcyes be excused at this time?

The Court: Unless there is objection, they will be excused.

Mr. Wulff: No objection.

Mr. Robertson: Now, your Honor, the plaintiff is prepared to rest the case in chief, subject to two things: First, subject to that ownership and control of the land stipulation which we have to discuss with Mr. Wulff, and I presume there will be no objection to that, and in the event we can't arrive at a stipulation, we will be allowed to reopen the case in chief as to that point.

Mr. Wulff: No objection, your Honor.

Mr. Robertson: Secondly, your Honor, as a statement of the record and so as not be concerned with any contention in the future in regard to Mr. Coon and his assistant Tex, the record will show on the motion to remand and so forth by affidavits and the like, that demand has been made from the defendant to ascertain their whereabouts, if they knew, and the other activities that have taken place on our part to locate those two persons, and we have been unable to locate them. We have understood from Mr. Courtney that they have moved to Arkansas, but no one knows where.

Mr. Wulff: That is not part of this case, your Honor. I [299] don't know anything about it.

The Court: The only purpose, I suppose, of the statement is to show that there is no wilful suppression of evidence.

Mr. Robertson: Yes, your Honor.

The Court: It doesn't tend to prove anything except that the plaintiff could not be bound upon the basis that there was a wilful suppression of evidence.

Mr. Robertson: Yes, your Honor.

Mr. Wulff: This case has been moved for six months.

Mr. Robertson: Well, the only point I wish to make is that the record will indicate in this case that a diligent search has been made for those parties and we have been unable to locate them.

Subject to the possession or title or ownership of the land and subject to Mr. Miller's stipulation as to distances, the plaintiff will now rest his case.

The Court: Don't you have those distances worked out yet?

Mr. Wulff: If your Honor please, they don't mean a thing to me. If the Court wishes me to stipulate, I will stipulate. I don't think it makes any difference whether it is one mile or one mile and a tenth. I don't know whether their speedometer is accurate, I know nothing about it.

The Court: Well, will you stipulate that these readings have been taken off a speedometer and have been presented to the Court here? [300]

Mr. Wulff: Yes, if they will be of any help to the Court, I will be happy to.

The Court: All right. I just want to get it.

Mr. Wulff: Your Honor, please, I would like to make a motion.

The Court: Well, let me get this out of the way here. Is there any objection to simply admitting this document here as being a document prepared by Mr. Miller from his observations, and you are not bound by it any more than that is what is on the paper here?

Mr. Wulff: Certainly.

The Court: All right. Let it be marked Plaintiff's Exhibit 30 in this matter at this time, so we will have that out of the way.

(The document referred to was marked Plaintiff's Exhibit No. 30 for identification.)

Mr. Wulff: If your Honor please, I would like to make a motion for non-suit at this time, reserving our right of course, for a directed verdict, on the ground that the evidence shows without any conflict that the cattle arrived at their destination—I mean, the livestock arrived at their destination at 10:00 o'clock on the 16th of December, and immediately were unloaded by the consignee, consignee assumed full control and custody of the cattle, and let them outside the corral.

The Court: You are bound to have cattle involved here, [301] Mr. Wulff.

Mr. Wulff: I am sorry. Can I change my cows for horses again?

The Court: You may have the record show when you say "cattle" you mean horses and mules.

Mr. Wulff: It will be very helpful, sir.

And the record shows that the horses and mules were outside the corrals at various times on the day of the 17th, and they got loose and Mr. Coon was rapidly in pursuit of them, and during that pursuit the accident occurred.

In other words, there is no custody or control shown in the railroad at all. In other words, the complaint charges we are the owners and in possession and custody of the cattle, and we were negligent in that particular, and negligent in our custody, control and possession.

There is no proof that we were. They arrived at their destination and the diversion order did not come in again until after the accident, in other words, 24 hours later, practically, and under those circumstances there is no liability and no duty owed to this party at all, nor is there shown any breach of duty.

The Court: Well, Mr. Wulff, on what basis do you say there is no duty on the part of the Southern Pacific for the care——

Mr. Wulff: Because our contract was one of carriage. They arrived at the destination. Our contract was completed. [302] They have the right to divert, but until they divert, the contract of carriage is completed.

The Court: When you are speaking of the contract of carriage, what are you referring to?

Mr. Wulff: I am referring to the livestock contract. That is our only duty, transport to Sacramento. That we did.

The Court: Well, now, that is Plaintiff's No. 19, then?

Mr. Wulff: I don't recall the number.

The Court: That is the one that is entitled "Uniform Livestock Contract."

Mr. Wulff: That is correct.

The Court: And is there anything in these waybills here that charges you or allows you to escape from liability?

Mr. Wulff: We have no escape because we completed our contract.

The Court: No. I mean in these waybills is there anything that charges you with responsibility or allows you to—when I say escape, I am speaking in terms of legal, not running out the door.

Mr. Wulff: That is right. Our contract provides, if your Honor please, that the livestock must be unloaded by the consignee. In other words, it is his risk. That is the loading and unloading.

The Court: What about the waybills? Is there anything in those waybills—— [303]

Mr. Wulff: Not a thing. The waybills have "Sacramento" scratched out and "Santa Rosa" inserted, and that was done pursuant to the diversion order. That was done on the 18th pursuant to the diversion order.

Now, the diversion order was introduced in evidence by the plaintiff. It shows they were delivered from Sacramento to Santa Rosa on the 18th. They were not our cattle at all, we had no custody or no control at all, and they would not be our cattle again

until the diversion order was signed and the consignee put them back into the cars.

The Court: Well, now, let me ask you something else here: I notice in looking at this diversion here, that "Sacramento" has been Xed out with red typewriter and with the same typewriter is written down below "Shell," I guess it is, S-h-e-l-l, "N.W."—I assume that is Northwestern Pacific?

Mr. Wulff: That is right. That is where that station is located on that railroad.

The Court: I understand that, but——

Mr. Wulff: That was done pursuant to the diversion order on the 18th, the day after the accident. Time is of importance, your Honor.

If your Honor please, I have a doctor in attendance here who has time complications. Could I put the doctor on and argue this motion later, and do it without——

The Court: Do you think you can finish with him before [304] lunch time?

Mr. Wulff: Yes, I hope to.

The Court: Well, all right.

Mr. Wulff: Is that agreeable, counsel?

Mr. Robertson: Yes. Of course, your Honor, understands I do not subscribe to any of the argument made and I will answer it at the appropriate time.

Mr. Wulff: Yes, that is agreeable.

The Court: All right.

(Here follows the testimony of Doctor Richard E. Kendrick, which testimony is omitted from this transcript.)

Mr. Wulff: Do you want to hear us on the motion?

The Court: Did you get that matter of the land straightened out?

Mr. Wulff: Yes, we did. We own to the street line, but we are not clear, there is no survey there, whether the grass runs up into the street, but as far as title to the property is concerned, we own to the street.

Mr. Robertson: That includes that area in the photograph.

Mr. Wulff: It doesn't include it all. That runs into the street, too.

Mr. Robertson: Up to the street.

Mr. Wulff: Into the street; because the street is narrow and there is grass in between. In other words, you have got an 80-foot right-of-way [305] there.

The Court: What you said, Mr. Wulff, was that you own up to the street?

Mr. Wulff: Up to the dedicated street. The dedicated street is partially grass, and that area where the horses were was in the street as well as on our property.

The Court: Does anyone know how wide that street is? Is it 40, 50 or 60?

Mr. Wulff: About 80 feet, I think it is. It appears to me to be 80 feet. I haven't had that checked; that is just my judgment.

The Court: They have awful wide streets over in West Sarcamento.

Mr. Wulff: That is right. My recollection is that

Broderick and Washington were laid out on the same basis as Sacramento is.

Mr. Robertson: My estimate would be about 50 feet. We can check it.

The Court: Well, it doesn't make any difference. The only thing we are concerned with here is that that property between the railroad right-of-way and those corrals is the property of the Southern Pacific.

Mr. Wulff: It is the street right-of-way, not the track; it is a street. The track is on the other side.

The Court: There is a track on one side up to the—the public thoroughfare, the edge of the public thoroughfare, does [306] belong to the Southern Pacific.

Mr. Wulff: Well, let's put it this way: That the northern edge is a dedicated street, and to the railroad track is clearly S.P. property.

The Court: That is putting it in reverse of what I said, but it is good enough. Does that satisfy you?

Mr. Robertson: Yes, your Honor.

The Court: All right.

Mr. Wulff: May I proceed, your Honor?

The question we have here is who permitted these cattle to stray.

The evidence does not show that the cattle were in the possession of the Southern Pacific Company, but it shows to the contrary that they were in the exclusive possession of Mr. Coon.

Now, the relationship between Coon and the Southern Pacific is evidenced by a written contract.

Now, that contract is that the railroad agreed to transport—let me get the language here:

“Carrier agrees to carry to its usual place of delivery and destination”—in other words to a certain cargo of livestock consigned to H. L. Coon and with destination Sacramento, California.

Now, that is in the first “Now, therefore” in the contract.

Now, the only contract we had was to transport that from [307] one place to another.

Now, this arrived at its place of destination. The evidence is that it was unloaded by Coon and Coon was out on the morning of the 17th and had driven the cattle from the corral—the horses, rather, from the corral to outside the corral, because, as their witness stated, feeding was easier, although they could have fed them from the troughs and the racks within the corral.

Now, that was the condition at the time of the accident.

Now, as a matter of railroading, a shipment that has reached its destination can be diverted within 20 days thereafter. Now, by diverting it under the tariffs, they receive a different rate, they receive a through rate, instead of the local rate for transportation. In other words, they are given a privilege of hauling it at a cheaper rate, but for all intents and purposes it is a new shipment.

Why? Because under the original contract, it has been completed.

Two days elapse before he elects to what? Exer-

cise his right to get a cheaper rate. When he exercises this right, the accident has already occurred.

Now, it is in his care, however you look at it. Take the tariffs; if it is in transit, has not reached its destination, the tariff says the custody and possession of the livestock while feeding, watering, resting, sorting or consolidation, [308] shall be that of the owner and not the carrier.

Now, if the S.P. didn't know, which it didn't know, that they were going to be diverted before the cattle were unloaded, then the cattle were unloaded for feeding, watering, resting, sorting and consolidation, and the tariff says that possession and custody shall be that of the owner and not of the carrier.

Now, under what hocus pocus, let's put it that way, can they say that the cattle were under the custody and possession of the railroad?

If your Honor please, this is identical, in my opinion, to a rather recent case in California, *Rutherford v. Reilly*, 104 Cal. App. 2.

The Court: *Rutherford* versus what?

Mr. Wulff: *Reilly*.

The Court: How do you spell the last name?

Mr. Wulff: R-e-i-l-l-y. Now, my girl left off the page citation of it, but it is 223 Pacific 2d, page 34.

The Court: I have that in the library, so you don't need to bother.

Mr. Wulff: In that case, the question involved was whether the operator of a boarding stable for horses was liable for injuries caused by a horse which escaped from a box stall while its owner was

in the act of placing a halter on it preparatory to exercising the horse.

Now, the defendant riding academy—in other words, this [309] is a factual situation so I will have to give the facts. Ours also is a factual situation, identical to this.

The defendant riding academy was engaged in boarding horses and the stable was adjacent to a riding range. The owner of the horse boarded the horse at these stables. The academy kept the horse loose in a box stall access to which was through a sliding door. When the defendant Reilly, the owner of the horse, opened the door, before he had an opportunity to place a halter on the animal, it bolted out through the open door, through a gate into the riding stables. The defendant Reilly and others attempted to head the horse from escaping, and their efforts excited the horse and it escaped to the highway, and on the highway the horse collided with an automobile driven by the plaintiff, injuring him.

The trial court, sitting without a jury, found that the possession of the horse was controlled by the two defendants, and immediately prior to the accident the defendants permitted the aforesaid horse to escape from the stables and later permitted it to stray upon the highway unaccompanied by a person in charge and control, and found judgment against both defendants pursuant to Section 423 of the Agricultural Code.

The stable operator appealed. The court held that there was no evidence that the stable operator was in possession of the horse, and in that regard, on

Page 630 of the California decision the Court [310] states:

“On the facts narrated, it is plain that Reilly was entitled to and was in exclusive possession of the horse from the moment he opened the stable door and that the possession of the academy as bailee thereupon ceased. The Court’s finding to the contrary is not supported by the evidence. The horse escaped from the stall through the act of Reilly and through no act of the academy, negligent or otherwise.”

Now, here the relationship of the Southern Pacific Company as a bailee ceased when this shipment arrived at the West Sacramento corrals on the 16th of December, and they were removed by the consignee. Thereafter the consignee, the owner, took charge, and it was through his acts, whatever they may be that they escaped. Just like it was the act of the owner of that horse. And therefore, as a matter of law, there is no proof there that the horse escaped from that area or corral or whatnot, wherever he may have escaped from, through any act of the Southern Pacific Company. Nor was the horse in the possession of the Southern Pacific Company. Our contract was completed. We were not rehired and did not become a bailee again until 4:30 on the 18th day of December.

Now, the liability they premise this on is based upon possession, custody and ownership. That is the complaint. Now, there they have an utter failure of proof. Under Section 423, [311] if your Honor

please, *res ipso loquitur*, is not application to this case, especially by statute.

Any questions, your Honor?

The Court: Not at this time.

All right, Mr. Robertson, what do you have to say about the matter?

Mr. Robertson: Mr. Wulff's argument is fine except, your Honor, it relates solely as between the rights, duties and obligations existing between the Southern Pacific Railway and one Charles Owens. The evidence conclusively establishes that the contract of carriage between Charles Owens and the Southern Pacific Company, period.

Now, I will invite your Honor's attention, and I believe you might have it up on the desk, to Plaintiff's Exhibits 17 and 18, which are the waybills. The waybills conclusively demonstrate that the shipment was between Texarkana, Texas, and Santa Rosa, California. That is the waybills.

The evidence is that those are the customary and only documents going along with a shipment of livestock in this case.

I think your Honor further may look at Plaintiff's Exhibit 11 in evidence, which, according to the statements of the defense, was a stockbook of the company kept in the ordinary course of business and which contained a statement by the assistant corral yard master stating that the horses [312] escaped from the corrals.

There is a duty between the railroad company and the shipper, in this case Charles Owens, which is one duty, and there is a duty of a common carrier

for hire carrying livestock and the general public, which is another duty.

It is true that Charles Owens and the Southern Pacific Company could contract whereby Charles Owens agreed that he would assume the responsibility of feeding his animals, and the only liabilities thereby extinguished would be the liability between the Southern Pacific Company and Charles Owens in the event that any of Charles Owens' horses died for failure to be fed or cared for, he having agreed with the consignee that he would feed them when they were in Sacramento. So that if a horse died here, or any of them became ill because of improper care, it could be argued between Southern Pacific and Mr. Owens that Mr. Owens gave up his right to require the company to feed.

However, the duty existing between Southern Pacific Company as a common carrier for hire engaged in the business of hauling livestock and bringing livestock into a highly populated area, as between that company and the general public an altogether different duty arises, and that is the duty to exercise ordinary care to see that those animals that they bring into the city limits or in Broderick, and which are unloaded here and put in their corrals, are cared for in such [313] a manner that the same shall not be allowed to escape and do injury to the public.

Now, if it please the Court, I am fully conversant with the Reilly case, and that citation, by the way, your Honor, is 124 Cal. App. 2d 629. In the Reilly

case there was an altogether different situation, both factually and as a matter of law.

In the Reilly case it was held that Reilly, the owner of the horse, and the stable owner, the Sleepy Hollow Stable, had a joint duty of the care of that horse to the general public so long as they both had it in their possession and control, but the court held that when Reilly came in, opened the door and took it out, then the duty became his.

Now, in that case, your Honor, it would be similar to a garage bailment, where an owner takes his car into a garage. It is true that while that car is in the garage, the garage owner would have liability, but when you go in and get your car and drive it out on the street, obviously they would have no further liability.

Now, on the other hand, if it please the Court——

The Court: How do you distinguish that from the situation existing in this case?

Mr. Robertson: In this case the records of the Southern Pacific Company themselves made in the ordinary course of business prove that the horses escaped from the corrals, and [314] the evidence shows, for the purposes of non-suit——

The Court: Well, now, wait a minute. Let's stop right there. In the Reilly case, the horse escaped from the stable of the Sleepy Hollow people, didn't it?

Mr. Roberston: No, your Honor. In the Reilly case, the owner came and opened a door and took the horse out and it escaped from him at that time.

The Court: Yes, but it is right there at the stable.

Mr. Robertson: Yes, but the owner himself opened up the door. Now, in this case, your Honor——

The Court: Well, Coon opened the door in this case here and let the horses and mules out of the corral.

Mr. Robertson: No, there is no evidence to that effect, your Honor.

The Court: Well, you can't have your cake and eat it, too, here. This very document that you are referring to says that: "Unloaded by owner, counted by me, not called by 12th Street, happened to see stock pass."

Mr. Robertson: No, on the right-hand side, your Honor.

The Court: I understand, but I can't shut my eyes and see only what is on the right-hand side; I must see everything.

Mr. Robertson: Yes. Your Honor asked me how does this case differ from the Reilly case.

The Court: Yes.

Mr. Robertson: All right. Now, in both of these cases [315] we know that the animals were put into an enclosure.

The Court: They were legally in what is tantamount to a bailment.

Mr. Robertson: Yes.

The Court: In both instances. In one instance it was the Sleepy Hollow Riding Academy, or whatever it was, I have forgotten the name of it; and in

this one here it started out as the Texas Pacific and then it became the Atchison Topeka and Santa Fe and then eventually the Southern Pacific.

Mr. Roberston: Yes.

The Court: All right. Now, go on from there.

Mr. Robertson: Going from there, your Honor, in the Reilly case, the horse was inside the stable and in the box corral with the door closed. Then the owner came and opened the door and took the horse out and it got away.

The Court: In this case here, Coon came and opened the door on the cars and took the animals off.

Mr. Robertson: No, they were put in the corrals, your Honor. The evidence shows that these horses were put in the corrals, you see.

The Court: By Coon, the same as Reilly put the horse in the box stall in that case.

Mr. Robertson: There is no evidence in the Reilly case that Reilly put the horse in. The ruling in that case, your Honor, was that they both had control over the animals as long [316] as they were in the corrals, but when the owner came and took the horse out of the corral, then he became responsible.

In this case, your Honor, the evidence is that they were put in the wooden corral, and the next morning they were taken out of the wooden corrals and fed out in the other enclosed area.

The Court: By Reilly.

Mr. Robertson: By Coon.

The Court: I know, but I am interpolating the

name "Reilly" in there because Reilly was the one who took the horse out in the Reilly case.

Mr. Robertson: The evidence is that this other outside enclosed area was enclosed by a fence and that the S.P. employee came in the morning and saw them there being fed in this wire fence enclosure, came again at a quarter to 4:00 in the evening and saw them being fed in this wire enclosure, and subsequently that the assistant, Mr. Duke, the next day filed a report that the horses escaped from the corrals and ran down the Yolo Freeway and two killed by autos.

Now, that is evidence, conclusive evidence, made in the ordinary course of business, these horses escaped from the corrals, and this event, we don't know whether he spoke of being put back in the wooden corrals and escaping from there, or whether they escaped from the wire enclosure.

We do know from the testimony of Mr. Courtney and the [317] police officer that the wire enclosures were not adequate and that horses could escape from them. We do know from the testimony of S.P. officials that they knew that that corral or wire enclosure was maintained on their property.

Now, one further thing I would like to point out to your Honor, the duty of the railroad in transporting livestock for hire under the Agricultural Code provides that such common carrier maintain adequate facilities for the purpose of doing that. Section 423 provides that—correction, 422 provides that "It is unlawful for any officer, agent or conductor of any railroad in this State, who, in carry-

ing and transporting horses, cattle, sheep, swine, or other animals, in cars, to confine the same in cars for a longer period than 36 consecutive hours without unloading for rest, water and feeding into properly equipped pens for a period of less than five consecutive hours.

“In estimating such time of confinement, the period during which animals have been confined without rest on connecting roads from which they are received must be included. In case the owner or person in charge of such animals refuses or neglects to pay for the care and feed of the animals so rested, the company or person operating such railroad may charge the expenses thereof to the owner or consignee and retain a lien upon the animals therefore until the same is paid.”

Now, the United States Code provides practically the same [318] thing, your Honor.

“Properly equipped corrals.” Now, the evidence in this case discloses that the shipment was made in two railroad cars from Texarkana, Texas, and ultimately ended up in Santa Rosa, California, on the same cars. That when the animals were taken off of the cars in Sacramento, no receipt for delivery of said animals was given by the consignee or the owner to the railroad, but that upon arriving at their destination in Santa Rosa, such a receipt was given by the railroad, which is a part of either Plaintiff’s Exhibit 17 or Plaintiff’s Exhibit 18, I don’t have my photostat number, a part of the waybills.

The waybills also demonstrate periodic——

The Court: Let's get that straightened out here. You show me where that appears.

Mr. Robertson: That is on the back of this certificate right there, your Honor.

The Court: Are you referring to the document that says "Northwestern Pacific Railroad Company Certificate, Santa Rosa, California, 12-22-54"?

Mr. Robertson: Yes, your Honor.

The Court: Well, let's read that.

"I hereby certify that all of the horses, mules, burros or asses received at Santa Rosa, California, in Cars AT27608, AT29117, shipped from Texarkana, Texas [319] on 12-9-54, were purchased by me from Has," it says; I assume that should be Chas.—"Owens, and were slaughtered at Santa Rosa, California, within 30 days after date of arrival. H. L. Coon."

Is it your position that that is a receipt?

Mr. Robertson: It is my contention that that is the only document that has been produced, that is a receipt for the animals. The car numbers which they were shipped in are noted there, and it is certified that they arrived and were purchased by Coon from Owens on the 22nd of December, 1954, and slaughtered in Santa Rosa.

It is my contention that obviously the railroad, being the final connecting line, is certainly not going to deliver 55 or 57 head of horses and mules without obtaining some receipt for the delivery thereof. It is my conception of this document that this constitutes a receipt.

That becomes, I think, a question for your Honor's legal interpretation.

Now, if it please the Court, here is one very urgent point that I think your Honor must go into in this matter, and it really becomes the crux of the case: the defendants' argument is to the effect that by regulations promulgated by the railroad and filed with the Interstate Commerce Commission and by contractual agreement with the owner or shipper, that they thereby excuse themselves from all liability to the public, [320] that they can bring into Sacramento—this is the effect of their argument—that they can bring in 56 or 57 head of horses and mules to Sacramento and from there on they have absolutely no duty of care to anybody, although they are in the business of transporting these animals and are maintaining feed and watering corrals. That they can open the door and lead those animals out and that is the end of their liability.

That, your Honor, would be an abrogation, not only of the Agricultural Code section requiring that they maintain adequate pens—and obviously the construction of that statute would be “adequate pens not only for the protection and care of the animals, but for the preservation of the public and public property.”

Now, I would like to cite to your Honor several cases: *Merring v. Southern Pacific Company*, 161 California 297, which provides that while an owner may agree to accompany livestock, this does not relieve the railroad from providing adequate feed,

water and properly equipped pens for their rest and feeding.

Most of these cases which your Honor will come across are cases involving suits by the owner against a railway for damages done to the animals, for the alleged neglect of the railway and unfortunately there is not much authority involving escape from railway corrals by which the public is injured, it again being the average case arising when an [321] animal is killed or has died.

Yet there are authorities for the proposition, and I cite to your Honor *Texas Railway Company v. Bigham*, 38 Southwestern 162, which provides that the pens must be constructed and maintained in such a state of efficiency as is reasonably calculated to prevent the animals escaping therefrom. The failure to fulfill this duty and disregard will render the carrier liable for loss or injury sustained thereby.

Now, following that case up, in *Brook and Olson v. Paine*, 181 Northwestern 803, it says that this duty—that is, to maintain adequate pens and so forth—is imposed by law regardless of the fact that the shipper retains control and management of the stock until lading is commenced.

Now, our position is this, your Honor—and by the way, Mr. Miller has some cases concerning the fact that if a railway allows someone else to operate one of its switch engines and that switch engine is operated negligently so that third parties are injured, the law holds the railroad liable for allowing its property to be used negligently to the detriment of the public.

The Court: I don't think you need to give me any authorities on that. That is almost a Hornbrook. If I put somebody in charge of my property and they go out here and injure somebody, I am liable for it.

Mr. Robertson: Here is a conclusion we have to draw, your [322] Honor. We know that the law provides that when a railroad undertakes the job of transporting livestock in cars for hire, they are under government regulations and statutes and state statutes that require them to stop, feed and rest the animals at periodic intervals, and it is required obviously in the discharge of the general duty to exercise ordinary care for the public, to exercise ordinary care to see that this livestock is not allowed to get out and injure the public.

Now, a typical example would be, in the Chicago stockyards; I don't believe anyone can intelligently argue that a railroad that brings stock into that stockyard, its duty is immediately discharged in putting the livestock in its pens by turning over the right to feed that livestock to the public. If it maintains inadequate pens and is on notice that the owner has taken that livestock out and is feeding it in an open area in another enclosure which is inadequate, can it be said that they, by having the owner sign some waiver as to feeding, that that relieves them to third parties?

The Court: Let me ask you a question now, Mr. Robertson: What could the Southern Pacific have done about this matter if they had objected to what Mr. Coon was doing?

Mr. Robertson: They could have instructed Mr. Coon to place the mules back in the corrals——

The Court: Suppose he said, "You go jump in the lake; these are my mules"—— [323]

Mr. Robertson: Mr. Coons was on Southern Pacific property, using Southern Pacific Company facilities, they could have ordered him off the property, placed his mules in the pens and had a lien on them until they were paid, and until such time as Mr. Coon made arrangements to have them physically removed from the premises.

The Court: Would they not have subjected themselves to a suit for conversion the moment they did that?

Mr. Robertson: No, I think as a bailee or as a carrier for hire, transporting stock, and particularly in this case in transit, that they have the right to exercise that degree of control over the stock since they have the custody, to protect the public.

The Court: That is the very crux of the thing there. Do you have any authority that says that they have that right to tell the owner what he may or may not do with his animals, and if so, how far can they go? Is that confined to the yard, or can they follow him out to the ranch wherever he is going to be and tell him, "You have got to do this or you have got to do that with these animals"?

Mr. Robertson: I have read all of the fine print on the back of that uniform livestock agreement—I cannot at this moment point out to your Honor the exact place—but there is a provision in the livestock agreement that gives the railroad control over

the animals and over anyone who accompanies [324] these animals to feed them. It reserves the right in the railroad to cause conduct of individuals going along to be such as to not expose the railroad. And also——

The Court: Isn't that the situation where they are in transit, which is what I am getting back to now? Doesn't your case stand or fall on whether or not there was actually a termination of the initial run here in Sacramento or whether or not there was actually a through run to Santa Rosa?

Mr. Robertson: No, your Honor, it does not.

The Court: Why not?

Mr. Robertson: Our case is strengthened by the finding of the Court that there was a through run. But let us assume for the purposes of argument that there was not a through run and it terminated here in Sacramento. You still have another provision of law whereby you have an owner maintaining a corral and bringing into his property animals. Having brought those animals into his property, his duty does not terminate as to the exercise of ordinary care until such time as those animals are physically removed from the property.

And again I say to your Honor——

The Court: Let's stop right there.

Mr. Robertson: All right.

The Court: Do you have any authority for that statement, that as long as these animals were on the Southern Pacific's property, even though the owner had taken the animals off the [325] car himself,

that the Southern Pacific was responsible? If you have something on that, I would like to have it.

Mr. Robertson: I wonder if Mr. Miller could argue that. I haven't read the case——

The Court: Certainly. All I want is to try to get some help on this.

Mr. Miller: Yes. I would like to cite to the Court the case of *Porter v. Thompson*, 74 Cal. App. 2d 474. That was a case in which the court had granted a new trial after judgment for the defendant, and the order granting the new trial was affirmed on appeal.

In this case the plaintiff—or rather, the defendant operated a cattle auctioneering yard where cattle were brought in.

The Court: I know that case, I think. That came from Modesto, didn't it?

Mr. Miller: I believe it did. your Honor.

The Court: That is where the cow jumped over the barrier and into the lap of a spectator at the auction yard that the defendant Thompson ran.

Mr. Miller: That is right, your Honor.

The Court: I didn't try it, but it was going on while I was there. Proceed.

Mr. Miller: And the Court there held that there was a serious question in that case as to the maintenance of proper [326] fences around the area in which the cattle were enclosed.

Now, the cow which escaped was not owned by the auctioneer.

The Court: As I remember, she was there in the arena being demonstrated and somebody frightened

the cow and she ran and jumped over the fence or barrier or whatever it was and landed in the lap of a spectator who was sitting there.

Mr. Miller: That is right, your Honor, and the Court held that it was the duty of the owner of the pen to provide a safe fence for the protection of the plaintiff.

Now, though it is true that the plaintiff——

The Court: I haven't read that case for a long time, but was there any differentiation made in that case between the fact that the person who was there was an invitee?

Mr. Miller: I was going to point out, your Honor, that in that case the person was an invitee.

Now, I would like to correlate that with what is a general rule with regard to railroads, and I would like to cite the Court to 75 Corpus Juris. Secundum on "Railroads," Sections 984 and 985.

The Court: 75 Corpus Juris. Secundum what?

Mr. Miller: Railroads, Sections 984 and 985.

The section stands for the principle, "As to persons on highways or private premises near its tracks, a railroad company owes the duty to use reasonable or ordinary care to avoid injuring [327] them."

Now, I would like to cite a case which I feel is fairly close in point. That is Clifford v. New York Central Railroad, 97 New York Supplement 954. There it was held that a railroad was liable for injuries caused by the throwing onto a highway of newspapers by an employee, not of the railroad, but

an employee of a news company, who was accustomed to taking its paper over the road.

On proof of the existence of the custom of throwing the newspapers off at that particular place where the injury occurred, and that the custom was known to the company.

Now, there the railroad company had the right to demand that the newspaper employee not throw these papers off of the train, and they acquiesced in the conduct of the newspaper employee in throwing those papers off the train, thereby approving the situation.

We have the same example here, where twice on the day of the accident and two hours before the accident, Mr. Coon was observed feeding the mules in an area outside the wooden corral and in the area surrounded by what the evidence clearly demonstrates is an inadequate fence surrounding the Southern Pacific property there.

I would also like to cite your Honor to a case involving general negligent permissive use of its property by a property owner. The case is—I can't pronounce the first name. I would like to spell it, it is P-s-c-h-o-m-y v. Brooks Market. [328]

Now, there are two citations for this, the second citation is not the important one. The one I think that—well, I will give them both. The first citation is 60 Cal. App. 2d 158.

Mr. Wulff: May I have that citation again?

Mr. Miller: 60 Cal. App. 2d 158, 140 Pacific 2d 431. The second citation for the case is 79 Cal. App. 2d 556, 180 Pacific 2d 933.

In the Pschomy case the owner of the property was sued. He had permitted a future occupant of his property, someone who had not yet entered upon a lease and had not yet entered on the property but who was going to open a store on this property, the owner permitted the prospective lessee to erect a sign upon the property and the sign was a small standing sign and it had an iron grille down at the bottom that came up and around like this (indicating), and a young lady was walking across the property and got her foot caught in the iron grillwork and fell and hurt herself and sued the owner of the property, and the case holds that the owner of the property is liable for the negligent permissive use of his property, that he had knowledge of the existence of this sign, the danger that was there, and failed to do anything to remedy that situation when it was within his power to do so.

Also cases holding the owner liable for negligent permissive conduct of a licensee: *Conrad v. Cloves*, 93 Indiana 476; [329] 47 American Reporter 388; *Smith v. Tennessee Railroad Association of St. Louis*, 160 Southwest 2d 476 at 479.

Also, as cases generally for the same proposition they may be found in 65 Corpus Juris. Secundum, Negligence, Section 92; 45 Corpus Juris., at page 879.

Mr. Robertson: Now, just to summarize for a moment, your Honor, there is in effect three legal relationships involved here, one legal relationship existing between the shipper and the Southern Pacific Company.

The Court: Which we are not concerned with.

Mr. Robertson: Which we are not concerned with. The other two relationships, which we are concerned with, the first and most important, I believe, is that this was a continuous transaction on the railroad from Texarkana to Santa Rosa, and they allowed these horses and mules to be placed upon their property and held there pending the routing back to Santa Rosa and that they are doing this as a common carrier for hire. In so doing that, they still have care, custody and control of these animals until such time as they reach their ultimate point of destination. That is the first legal relationship.

The second one is assuming for the purposes of argument—I don't agree with it; I think the evidence goes otherwise—that this is not a fact, can a common carrier for hire that is under duty to maintain adequate corrals and is under a duty [330] to unload these horses and put them off in their corrals awaiting delivery, can they escape all liability by merely saying that the moment the train arrives they have no further liability of any kind or character?

I think that having maintained these corrals on their property for hire and as a part and parcel of their carrier service, that they have a duty to exercise ordinary care as against the public at large to see that injury does not result.

And here the railroad was on express notice by their own employee within two hours of the accident that the animals were not being properly

maintained but were being held in an area in which the fence was not adequate to hold them, and the ultimate fact is that the animals did get out and onto the freeway a mile or so away and injury did result.

Mr. Wulff: Just a few words, if your Honor please.

As far as the Agricultural Code 422, there is no need to go into that. That section only deals with intrastate shipments, and we have here interstate shipments between Texas and California. So that is out of it entirely.

Now, they have overlooked in all their arguments—to take up their various three situations, they overlook the contract. Our connection with this livestock only comes through contract. The contract is to carry them from Texas to Sacramento.

Now, that we have established at the time this accident [331] occurred. Therefore, the relationship of bailee and bailor ceased when Coon took that shipment over. Now, we do have a lien to secure our cost of transportation, but the lien has no bearing in this case. We are dealing now, not with the parties to the lien at all; we are dealing with a member of the public operating a mile and a half away on a public highway.

The Court: Mr. Wulff, what about this situation, though: You have your pens out there as a part of the service that you provide and you allow Coon, in this case here, to go out and use your pens in such a fashion that——

Mr. Wulff: He used our corral only.

The Court: Well, he was using the territory out there, whatever you want to call it, in such a fashion that the animals were likely to escape and get out on the road.

Mr. Wulff: We don't know what happened. Now, let's take the situation that we have——

The Court: Well, we know they got out on the road.

Mr. Wulff: All right. In the first place their whole cause of action is based upon—let me read it —“That on or about the 17th day of December, said defendants, and each of them, owned or possessed and controlled and had in their sole care and custody such mules and horses in the immediate vicinity of Park Overpass on U. S. Highway No. 40, about one mile west of Sacramento, and was so negligent, careless and reckless in their said care, custody and control, ownership and maintenance, of said horses and mules as to allow said animals to stray.” Now that is the only act of negligence they charge, is negligence in [332] the control, custody, care, ownership and maintenance of the horses. A joint tort negligence being the same thing, the same thing is accused. Now the proof is that Coon had the exclusive control, management and ownership of the horses. They have failed to prove their cause of action. Now that is the only cause of action we are here defending. We have not any cause of action here relative to defective pens. Now, the evidence is from Mr. Courtney, their own witness, who testified that the corrals were in good shape.

The Court: That is the wooden corral.

Mr. Wulff: All right. Now there is no plea that the wire corral was supplied by us. The evidence is that one third of the enclosure was put in there by Mr. Coon himself.

Now an enclosure is not an enclosure unless it is all enclosed. One-third of the area enclosed was put in there by Coon himself.

The Court: I think it was one-third of one side.

Mr. Wulff: One-third of one side, and the answer is it is no enclosure unless it is all enclosed. You haven't got an enclosure unless you have got it enclosed, let's put it that way.

Furthermore, they have to prove, do they not, that the horses escaped as the proximate cause of some defect?

Now there is no proof of that, none whatever.

The Court: Do they necessarily have to prove a defect? In the negligence allegation—what was that wording there [333] again—"They were so negligent, careless and reckless in their said care, custody and control, ownership and maintenance of said horses and mules as to allow said animals to stray and come upon the said Park Overpass."

Now then——

Mr. Wulff: That is all. They were in the exclusive possession and control of Coon.

The Court: Well, let us assume for the sake of argument that Coon had the animals out there on your land and you knew about it. Is there any question but what Mr. Perine——

Mr. Wulff: He ascertained it during off hours.

Is that knowledge to us? He wasn't acting in the scope of his employment. It was off hours.

The Court: Apparently he received the animals at off hours, so he had some duty. He said his hours were from four to midnight and he made this entry in here on the left hand side which I am going to look at now at 10:00 a.m. So he was off duty when he made that entry.

Mr. Wulff: No, I think not, I think that was made in the office, he said it was made at the office. So therefore he did that during his hours on the job.

The Court Well, four to midnight and 10:00 a.m. do not——

Mr. Wulff: Well, but he made the entry then. The book is kept in the office. He had to be at the office to make it. [334]

The Court: I know, but if he knew these facts to make the entry, it occurred at 10:00 a.m. in the morning.

Mr. Wulff: That is right, he knew about it.

The Court: And he was off duty.

Mr. Wulff: But the proposition is—in other words, all knowledge of our employees when they are not acting in the scope of their employment is not knowledge of the company.

The Court: It is the minute they put it in this book here.

Mr. Wulff: Yes, but he didn't put in that they escaped in the book. He didn't put in the book that the cattle were outside of the wooden corral.

The Court: But he can't come in here and put

part of the information in here. You are very anxious to rely upon this statement in here that they were unloaded by the owner.

Mr. Wulff: That shows they left our possession and shows that our contract was completed.

The Court: Can you seriously argue to me that your employee can tell you half the facts in the matter and you rely upon that and the other half he keeps a secret to himself and you are not bound by it?

Mr. Wulff: If your Honor please, I think the law of master and servant is clear, that the employer is only liable for the knowledge of his servant acquired during the course and scope of his employment. [335]

The Court: Well that is out, then, because you didn't acquire that information about the stock coming in during the time of his employment. If your argument is sound that part of it is out and there is nothing in this case to show that Coons ever received the animals.

Mr. Wulff: Yes, Mr. Courtney here said that he helped Mr. Coon feed the animals.

The Court: That doesn't prove that he had received them from you.

Mr. Wulff: There is no proof—in the first place, the Court has overruled that the contract provides that the loading and the unloading shall be, as the contract says—that is a part of the contract here—"The shipper at his own risk and expense will load and unload the cattle." That is the contract.

The Court: Mr. Wulff, I understand that part of the thing, but do you mean by that that you could bring a carload of animals in here to Sacramento, let's say a bunch of Brahma bulls into Sacramento here and just open the door and say, "So, here you are, Mr. Consignee, here are your Brahma bulls, you catch them any way you can," and kick them out the door and let them run in every which direction——

Mr. Wulff: We are dealing now with a case in which the plaintiff has the burden of proof. Now the presumption is that the contract has been performed. Now they have got to prove to the contrary. They have not proved to the contrary. [336]

My ground is that they haven't proved their cause of action. You are saying they can prove it, but they haven't proved it.

The Court: No, I am not saying that. I am saying that the testimony in this case is that these animals were out on the property that you have stipulated belongs to the Southern Pacific Company. Now what is your duty under those circumstances? Does the entire burden fall upon Mr. Coon or are you by reason of the fact that you are letting your consignee keep his stock on your property assuming liability.

Mr. Wulff: The Court is assuming that we have permitted the stock to be kept in the wire enclosure. There is no proof at all. The only evidence in here came from our man, Mr. Fisher, who said the only thing he permitted him to use was the wooden corral.

The Court: Mr. Perine said he saw them there.

Mr. Wulff: But in their possession, it was their cattle, they owned them. We had no control over them. Our contract had ceased. Now——

The Court: Now wait. You are evading my question, though. My question is: Suppose they were Mr. Coon's and in his control. Can you allow animals to remain on your property there and assume no responsibility?

Mr. Wulff: Number one, now, we haven't got that question in this case. [337]

The Court: Why not?

Mr. Wulff: Because the negligence charged is that we were so negligent, careless and reckless in our said care, custody and control, ownership and maintenance of said horses and mules as to allow them to stray.

We had no care, we had no custody, we had no control, we had no ownership, we had no maintenance of those horses.

The Court: Well, if you are saying to me that because Mr. Coon and Tex were out there herding these animals, that that exonerates you completely from any allowability——

Mr. Wulff: I am saying this one step further; I say the moment those horses were taken off the cars our care, custody, control, ownership and maintenance ceased.

The Court: All right, let's go back to the Brahma bulls. They come up to a place here and you open the door and let the Brahma bulls out and

say, "All right, Tex, you and Coon catch these Brahma bulls anyway you can here," and the Brahma bulls go out and kill somebody's little girl across the street there.

Mr. Wulff: If they proved that here then they would have something, but they didn't prove that.

The Court: What did they prove?

Mr. Wulff: They didn't prove it at all, no, because they were unloaded from our cars and put into the pens and the door closed on the 16th day of December. [338]

Now the evidence of Courtney is "we let them out of the pens on the morning of the 17th, the next day, because they feed easier outside than they do inside, although we could have fed them inside."

The Court: I realize that, but that goes to the weight of the evidence rather than the question of——

Mr. Wulff: Oh, no, no.

The Court: Now, wait a minute, let me finish——

Mr. Wulff: The answer is that they had been delivered to a safe place, if your Honor please, one day.

Now a stranger to us with whom we had no relationship at all at that time, he is not even a bailor any more, because the shipment has arrived, lets them out by his voluntary act.

In other words, we must be an insurer to be liable.

The Court: Well, you have seen that this stranger has let the animals out of your pen out

there. What I want to know is, is there any liability on your part?

Mr. Wulff: Utterly none. Why? Because he has got the exclusive control and custody over them, they are his own cattle. If we said, "Get them back in," he could tell us to go jump over the moon, and what could we do about it?

Sure we could start procedure, "Now you have broken your permit." But before we could do that the cattle have escaped.

Furthermore, we have got the evidence in here that he is a skilled livestock man. We have got two men there that are [339] skilled livestock men. They are skilled livestock men.

The Court: I am thoroughly conscious of that fact, but Mr. Conrad—was that his name?—said that he saw both Tex and Coon there——

Mr. Wulff: That is right.

The Court: ——watching these animals.

Mr. Wulff: That is right. Now they escape. The day before they were in our cars. Now we are liable. They are on our property by permission. Now——

The Court: I am prepared to say that I feel definitely that the mere fact they were in your car the day before does not cast any liability upon you, if the evidence is that this was a concluded transaction, you were at the end of the line here. But, on the other hand, now, the point that Mr. Miller and Mr. Robertson make is, when you allowed this stock to remain upon your property there do you owe any duty to the public to see that they do not escape.

Mr. Wulff: We owe—it is no more than being—I don't care, they have a possessory right, do they not, whether they are on there as a bailment, whether they are on there as a lessee or whatnot? I don't care if they are there for one day or ten years, it is a possessory interest in land, is it not?

The Court: Well, I am not talking about the land.

Mr. Wulff: Yes, I am, that is exactly what you are [340] talking about. You are talking about——

The Court: Well now, Mr. Wulff, I may not know much, but I don't think you know what I am thinking.

Mr. Wulff: That is possible.

The Court: What I am trying to get over is, if you allow animals to remain on your premises, is there any duty on your part to see that the public is prevented from being harmed by those animals?

Mr. Wulff: None whatever.

The Court: All right. Now, where is your authority for that?

Mr. Wulff: The authority is logic. If your Honor please, that is not our cause of action here, I am not prepared to defend this case on that theory, because we have not been charged with it, we are charged with——

The Court: I think when you were charged with the maintenance of this stock there that that is sufficient——

Mr. Wulff: All right. In other words, the proof shows that we are not maintaining them, that Mr.

Coon is maintaining them. He unloaded them. Now that is their proof, that is not my proof. They are bound by it even though I am not on that situation.

Now let me answer the question—in other words, we give them the possessory use of that land. Now, if they bring property on that land and it strays it is their obligation, [341] because we have given them the permission to use the land for that purpose. It is a lessee obligation, if any. There is no liability of a lessor. Whether it is for one minute or ten years, whether you call it a bailment or whether you call it lessee, it makes no difference. There is utterly no liability, never has been in the law, for a lessor liable for a tenant leaving cattle stray from the land.

Take Section 443 of the Agricultural Code, what does it provide for liability in this case?

It says here, “No person owning, controlling the possession of, any livestock shall wilfully or negligently permit such livestock to stray upon or remain unaccompanied by any person in charge and control thereof upon a public highway.”

That is a statute they call it to the Court’s attention.

That is not the Southern Pacific Company. We were not the owner of the cattle, nor were we controlling and in possession of it.

For the simple reason we let somebody use our premises and they negligently let the cattle escape, how can you fasten that liability upon a lessor?

The contract has been let. He had a right to stay

there for twenty days during that diversion period, if he wished. He has bought that and paid [342] for it.

We can't control him while he is there. He has got possession and he has got ownership.

The Court: Suppose Mr. Coon decided that in the interest of saving money he would turn the animals out to graze along the road there during that twenty day period, what then?

Mr. Wulff: Could we stop him? Our relationship had ceased with him. He could have driven his cattle off of our premises. We may not let him back, but they may have escaped, they may have strayed while they were off, or they may have gotten out the next day after he drove them back.

In other words, they were in his custody. He had two men with him.

Now I don't think there is any proof of negligence. We don't know how they got out. There is no proof at all.

Now Section 423 of the Agricultural Code says that they have the burden of proof *res ipsa loquitur* is not applicable. They have to prove it. There is no proof of negligence here. Even the straying, they don't show how they got away, and that they have got to prove. The last proof is they were in their control at a quarter to four that afternoon, and the next proof we have is at five thirty the officers said they were out.

Now what happened in the meantime? Is the matter of fact that they did stray proof of negli-

gence? 423 of the Agricultural Code says it is not, by express statute in this [343] State.

Is the Southern Pacific Company liable merely because they strayed, because it is possible they could have got out this way or that way? I say not. I say they have the burden of proving how they got out. Utterly no proof as to what happened there.

Anything further, your Honor?

The Court: No.

Mr. Miller: I have just a few very short things to say, your Honor. First of all I think it is quite clear that we are not dealing with a lessee-lessor relationship here. There is no lease of the property which was ever shown.

The Court: Well, on what do you predicate that? I assume there was no formal lease, all right, but if this rule here that they have twenty days that they can keep them there in the pen—what is the relationship? A bailor and bailee——

Mr. Miller: Well, I think they are a licensee, they are allowed to come on the property with the consent of S.P. to feed them. I might point out that what we have here and what we have established was a long standing custom between Mr. Coon and the Southern Pacific Company, in addition to whatever contractual relationship they might have had whereby he had indicated in early times that he wished to come onto his property and feed the mules. [344]

Now, I think the contract, if you will look at it, will show that the mules can stay there in the yards

for 20 days, but it doesn't prevent the S.P. from using that for other animals. There is nothing to prevent the S.P. from bringing in other animals and storing those animals in the corrals.

And, as I said, there is nothing in the contract that says that Mr. Coon shall have the right to come in and feed those animals. That was handled through an agreement reached between Mr. Coon and Mr. Fisher, which was course of conduct between the two.

The Court: Well, now, the tariff here says "Custody and possession of livestock while feeding, watering, resting, sorting and/or consolidating, shall be that of the owner and not that of the carrier."

Now, under the law these tariffs here are a part of any contract. They are specifically incorporated through the bill of lading or waybill or whatever you want to call it.

Mr. Miller: I might say, your Honor, there was in the record that Mr. Coon obtained permission from the Southern Pacific to go in there and to feed those animals.

I might say this: The evidence is clear that at a quarter to four on the day of the accident those animals were outside of the wooden corrals and inside that fenced in area. I also might note that Mr. Wulff erroneously stated that Mr. Coon built part of that fence. The testimony is that he put an [345] extra strand on part of it. The fence was already there.

The Court: No, the testimony in that regard was that he put one wire across one-third of the south

side of it to make the enclosure. That was the testimony, as I remember, and that he also put up some wires around the fence to reinforce it where it was in bad condition.

Mr. Miller: Well, I might say, going back to that wire fence that surrounded the area, that the fence was there for around five years and was known to be there by the Southern Pacific people. The Southern Pacific allowed that fence to continue on the property. I state that the existence of that fence could have only one purpose, and that would be to enclose livestock, and it can constitute invitation to people using that corral to take livestock out there and feed them in that area.

The Court: Isn't the Southern Pacific entitled to assume that people will obey the law and people who use their property will use it in a lawful manner? They don't have to go around and tell everybody, "Now, look, if you are going to use our property, you are going to use it lawfully and not violate Section 423 of the Agricultural Code."

Mr. Miller: But in this particular case, if your Honor please, the S.P. had actual knowledge that those animals were outside the corral and were being fed outside the corral. I might say this, [346] too——

The Court: Yes, but your evidence is conclusive, too, that there was never any time when those animals were alone there. Mr. Perine said he only saw one man there, but your own witnesses said there were two people there, Tex and Coon.

Mr. Miller: That was an earlier time, your

Honor, at 10:30 in the morning. Mr. Perine was talking about a quarter of four in the afternoon.

I might say this. If we are going to look at the contracts, we have got to assume one of two things: Either Mr. Coon had the right to use only the wooden enclosed portion as a corral, because if that was the only portion he was allowed to use, he had no right to take them outside. I think you will agree with me on that.

The Court: How does that help us in this case here? If Coon was violating the law, doesn't that come right back to the statement I stated a moment ago, the presumption is that everyone obeys the law.

Mr. Miller: Well, they acquiesced in his conduct, they saw him doing it, and they didn't—

The Court: They didn't see him turn them out on the street; they simply saw him out there on this land, and while the fence was grossly inadequate to have left them there all night, we don't know from the evidence where they did escape from.

Mr. Miller: Well, I think the Court can draw an inference from the testimony in the record that that fence was a very [347] poor fence, was grossly inadequate. Mr. Courtney testified, as I recall, that the mules could have got out of there if they wanted to. There was no real problem in the mules getting out. I think we can draw an inference from the fact that a short time before the accident they were out in that area where they could easily escape, and draw an inference that that is where they did escape.

The Court: Suppose the Southern Pacific provided an adequate corral for them out there, and Coon, for reasons of his own, whether they were good, bad or indifferent, elected not to avail himself of these adequate corrals provided by the Southern Pacific and took them out to this inadequate place out there, what could they do about it?

Mr. Miller: Well, let me say this, your Honor—first of all, I would like to make my other point:

It is difficult to say what is meant by the Washington Corral. One definition of it would include only the wooden—a corral is an enclosed area; one definition would include only the wooden enclosed area; the other definition would include also the outside area which had the wire fence around it.

Now, I might say that if he had the right to use both areas, that S.P. had the duty to make both areas safe. If he had the right to use only the wooden area, then I believe S.P. had the right to remove those animals from that portion of the property which he had no permission to use. [348] Or, they did not do that. They acquiesced in his using that property, and even though the surrounding fence was in very poor condition and it was very easy for the animals to escape——

The Court: Let me pose a question to you in this regard here: Suppose I have a piece of property that has good fodder on it, good grazing on it, but no fence around it, and I have no animals on it at all, but my neighbor, who is a very bad farmer, doesn't keep his fences up and his animals are all

the time getting over into my field, and I am a slow, easy going sort of a person and I don't want to arouse my neighbor, so I go over and put the animals back and do everything in the world I can do to avoid a row, and this goes on for days or weeks or months, and then all of a sudden one day one of the animals that has been getting over in my place regularly, and I knew that he was getting over there, gets out on the road and somebody hits him with an automobile. Am I liable?

Mr. Miller: I think it is a different situation there, your Honor. I think in a situation like that, that first of all you are not maintaining any services for hire for this neighbor, and secondly you have done everything that is to be reasonably expected of you under the circumstances.

The Court: Well, let's put it a little nearer the situation we have got here: My neighbor isn't a neighbor at all, he is my renter, he rents this one piece from me here; but he has the absolute duty of keeping up the fence around [349] there, and when I rented the piece to him it had a good fence, but for reasons of his own he cuts the fence and lets the animals get out, and, as I say, I am an easy going fellow and I don't want to have a row with my tenant, and all I say is, "Can't you get those stock back in and can't you keep them in," but I don't do anything about it at all, I just let things go on, they tramp around through my fine lavina clover or whatever I have on this place here and the next thing I know after they have been in there one of them gets out on the road and gets killed.

Mr. Miller: There, your Honor, you stated that you are leasing the property. I believe your tenant would have the exclusive right of possession and that you would not have any exclusive right—in other words, you have made a conveyance of land there, and I don't believe there was any conveyance of land in this case.

The Court: Well, what was it, then? They had a right or a license of some sort to be over in those corrals, didn't they?

Mr. Miller: I think the most dignity we can give to Mr. Coons' or Mr. Owens' right actually is a license. I don't think we can dignify it, as Mr. Wulff did, by calling it a lease. I think he is a licensee, and the cases I cited as to negligence permission, the land owner acquiescing and permitting negligent conduct by a licensee on his property causes [350] the owner to be liable.

The Court: Of course, there is only one fallacy in that situation: This negligence didn't occur on the property, it occurred off of the property, or the damage occurred off the property.

Mr. Miller: That is the unusual part of the case, your Honor.

The Court: Well, those are all the questions I have.

Mr. Wulff: There is just one point, your Honor, I want to call to your attention. Mr. Courtney, their own witness, testified that Mr. Coons stretched the wire to fence a small piece off, which was sufficient to hold cattle in there if watched but not sufficient

if the cattle wanted to get out. He said if watched it was sufficient. That was his testimony.

The Court: He testified that they put this one wire across one-third of the south portion of the property there.

Well, I think we have reached a place now where we are just talking.

Mr. Robertson: Yes, your Honor.

The Court: Mr. Wulff, how long do you anticipate it will take you to adduce your evidence in this case if called upon to do so?

Mr. Wulff: I can't get it done today, I am sure. I am trying to get to Colusa tomorrow. I kept my head down boring in for that purpose. [351]

The Court: What?

Mr. Wulff: I kept my head down boring in for that purpose.

The Court: Well, I was going to say if you can't get done today—did you say you could or couldn't get done today?

Mr. Wulff: I don't think so.

The Court: Well, if you can't get done today you are not going to be in Colusa under any circumstances.

Mr. Wulff: If I get a non-suit I am.

The Court: I know, but what I am getting at is I'd like to take a little look at the books myself here before I have to act on this, and if you can't finish today under any circumstances—assume I take an hour now to look at this could you finish tomorrow?

Mr. Wulff: Oh, yes, your Honor.

The Court: In other words, we can't finish today, and you can't go to Colusa tomorrow unless I grant the non-suit?

Mr. Wulff: Yes, that is right.

The Court: And I will tell you if I have to act on it now without reading a little bit you know what the answer will be. So I think we better take——

Mr. Wulff: We have Dr. Grayson coming at 3:00, who postponed a trip for tomorrow to be here. Could we put him on? [352]

The Court: Well, if we do then the motion will be denied, that is all. In other words, I like to accommodate these doctors, but I have got to run this court here, I have people on my back, I have Judge Denman calling me up because my calendar isn't up——

Mr. Wulff: The doctors are running us, your Honor.

The Court: What?

Mr. Wulff: The doctors are running us.

The Court: Well, let him make his trip today.

Mr. Wulff: I like that.

The Court: The only point I am getting at is I am under the gun all the time here. While I don't have sick patients to worry about I have got a lot of people otherwise to take care of.

Mr. Diepenbrock: Well, he is more of a business-like doctor, your Honor. He is an X-ray reader, your Honor.

The Court: Well, nobody is going to get hurt if he has to wait.

Well, we are going to stand in adjournment until

3:45, and I am going to do some examining here.

Now, if anybody of you gets any bright ideas where you have got a case to support it—I don't want any more talk, but if you have got a case to support a bright idea you can pass it in to my secretary and she will see that I get it; but I am not going to see anyone, because I am going to go [353] in there and commune with the legal books for a while until 3:45, and I will announce my decision on this question.

Mr. Wulff: I think 140 Cal. App. is the only case you can find.

The Court: Well, I only say that so that if you do get some authority you can pass it on to me. I don't want to be interrupted unless you have got an authority.

Mr. Wulff: We will be very happy to——

Mr. Robertson: I didn't realize you were going to it under submission. I have several other authorities I would like to cite to your Honor on the proposition of maintaining cattle.

The Court: Well, what were you doing all this time, Mr. Robertson? That is what I was trying to get you to do was to get these authorities collected here.

Mr. Robertson: I would like to cite to you Jackson v. Hardy, 70 Cal. App. 2nd, 6.

And Anderson v. I. M. Jamieson Corp., 7 Cal. 2nd—60, and Galeppie Bros. v. Bartlett, 120 Federal 2nd, 28.

I believe I cited to your Honor the other cases.

The Court: All right. Stand in recess until 3:45.

(Recess.) [354]

Thursday, March 8, 1956—3:50 P.M.

The Court: Gentlemen, I have been in my chambers since we recessed and I have looked, I think, at all but some of the Eastern cases. I did not have them available and I have not looked at them, but I have looked at all the other cases that were cited in the arguments.

I feel constrained to say that the case of *Rutherford v. Reilly* is controlling in this case, and in the face of that I just don't believe the plaintiff could prevail in this case. And under the circumstances, rather than to run up additional expense and increase the record in the matter I might just as well be honest with you and be honest with myself and grant this motion at this time. I am going to grant it on its merits and I direct findings to be made in this matter by the defendants and presented to me in the usual course.

I will say in that regard that I find that Mr. Grigg was not guilty of contributory negligence at the time of the accident; that I find that the animals in question were outside of the control, custody or ownership of the defendant Southern Pacific Company and were in truth and in fact in the custody, control and ownership of the consignee—I don't know what his initials are—Cun, anyhow, and in preparing your findings so find.

I say that I find that Mr. Grigg was injured as a result of this accident, but in view of the other ruling I [355] do not think it is necessary for me to define as to the nature and extent of his injuries at this time, although you may make the general finding that he did receive injuries as a result of the accident, and his car was damaged as a result of the accident.

Now, then, the point is that I am convinced as a matter of law that the plaintiff cannot prevail in this action. If I am wrong, an upper court would have to make that statement. If we spend another day trying this that just adds to the expense and the trouble and the difficulty of getting the matter before the appellate court.

And in that frame of mind I do now grant the motion for an involuntary dismissal of this action on the merits.

Mr. Robertson: If it please the Court, I would like to request two thing alternatively: number 1, that we have a finding by the Court as to where the termination point of the shipment was. I think that becomes, as your Honor related earlier, a very important matter.

The Court: Well, I am convinced on the record as it appears before me that the animals were shipped from Texarkana to Sacramento, and that they were diverted from Sacramento to Santa Rosa. I do not believe that they were ever shipped from Texarkana to Santa Rosa. Now that finding I am perfectly willing to make.

Mr. Robertson: Now one other thing, your Honor; I [356] would like to suggest something—you might think it is unusual, but I think it will save a lot of time and effort, perhaps.

Since I have argued before you I have gone to the law library and found two things: number 1, that where a way bill of lading has one destination on it and a change is endorsed on that showing another destination, there is a presumption that there is a continuous transit from the point of origin to the changed point of destination. There is a presumption on that, and I would therefore suggest, since your Honor indicated that our case either stands or falls on that point of where the destination was, that if I could——

The Court: I didn't mean it in that sense of the word. I meant that it would stand or fall on the question of whether or not these animals were in the possession, control or ownership of the Southern Pacific Company, and I find definitely that they were not at the time that this accident occurred.

Mr. Robertson: Yes, your Honor, but the point I was making is this: Would your Honor be willing to do this, having in mind the cost of appeal, that the matter be continued for say five days or so to allow us to prepare written briefs, because I feel, your Honor, that when I present these authorities we can show that the transit was continuous to Santa Rose. By virtue of that and another case I have recently uncovered, [357] *Snyder v. King*, that where the transit is continuous, regardless of whether——

The Court: I think you better do that in the nature of a motion for a new trial. In other words, I want to terminate this matter now, because if I continue this for five days and then I have to start over again, then I have got my whole calendar fouled up on the matter.

You have closed your case in the matter and you have a right to make a motion for new trial and it will be given careful consideration. I am not prepared to say that this isn't a close matter. I don't want anyone to get the impression that it is just one of those things where you can even decide it right now, because it isn't that sort of thing at all.

Mr. Robertson: I think it is a very difficult legal question.

The Court: I think so, too, and I think you can reach it better, more satisfactorily, on a motion for a new trial than you can by a continuance, because of the nature of my calendar here. If we get fouled up on the matter here it might run along for weeks before we ever get the thing out of the way.

Mr. Robertson: Well, yes. The only one thought I have on a motion for new trial, if we did convince your Honor on the law we would have to go to the expense of reputting in all the evidence, unless we could arrive at some stipulation [358] on the record.

The Court: Well, if you get me reversed you will have to do the same thing.

Mr. Robertson: Yes, that is true, your Honor.

At any event, your Honor will instruct that the other finding be made that the terminal point is Sacramento, California?

The Court: No, I will say that I am convinced that the animals were originally sent from Texarkana, Texas, to Sacramento, California, and they were diverted from Sacramento. That finding may be made in accordance with the record.

Mr. Wulff: Mr. Reporter, may I have a transcript of the statement of the Court so we can have it clear in preparing the findings.

The Court: Well, that is very flattering of you, Mr. Wulff, to say that the thing will be clear after you have looked at what I have said.

Mr. Robertson: I would like to have a copy so I can compare the findings.

The Court: And naturally you will have an opportunity to propose any—or make any suggestions you might wish in that regard.

Mr. Wulff: We will submit it, your Honor.

The Court: Certainly I have no arbitrary feeling about the matter.

[Endorsed]: Filed July 27, 1956. [359]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case,

and that they constitute the record on appeal herein as designated by the parties:

Petition of Southern Pacific Company for Removal from State Court to United States District Court, together with attached documents:

Complaint,
Summons,
Answer.

Motion to Remand Civil Action.

Notice of Motion to Remand Cause with Affidavit of Charles J. Miller, attached.

Answer to Petition of Southern Pacific Company for Removal of Cause with attached documents.

Memorandum and Order, filed December 5, 1955.

Minute Order of December 19, 1955.

Amendment to Complaint.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Motion for New Trial and for Amended Findings with Motion for.

New Trial and for Amended Findings and Memorandum of Points and Authorities in Support of Motion for New Trial attached.

Memorandum and Order, filed July 16, 1956.

Plaintiff's Notice of Appeal to the United States Court of Appeals.

Plaintiff's Bond for Costs on Appeal.

Appellant's Statement of Points on Appeal.

Plaintiff's Designation of Record on Appeal.

Defendant's Designation of Additional Portion of Record on Appeal.

Reporter's Transcript (Vols. 1 and 2), pages 1 through 359.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 11, 12, 13, 14, 16, 17, 18, 19 and 30 in evidence.

Plaintiff's Exhibits Nos. 9 and 10 for identification.

Defendant's Exhibit No. "A."

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 1st day of August, 1956.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 15220. United States Court of Appeals for the Ninth Circuit. Glen Earl Grigg, Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: August 3, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.